

# ISLAMIC JURISPRUDENCE AND THE REGULATION OF ARMED CONFLICT

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## **ISLAMIC JURISPRUDENCE AND THE REGULATION OF ARMED CONFLICT**

The increase in violent attacks against civilians and non-civilians and the claims made by groups waging such attacks that their acts are legitimate under Islamic law generated wide interest in Islamic ‘laws of war’. This paper attempts to challenge the approach focused on comparison between international humanitarian law (IHL) and Islamic law on the basis of the rules adopted in each system and argues that both legal regimes are governed by certain theoretical and ideological paradigms that are distinct from each other. In order to highlight this difference, the paper examines the different juristic approaches to issues of concern to the jurists and shows how these approaches reflected particular agenda and thus can not be simply compared to rules of IHL, because these are equally governed by other agendas and interests.

### **1. Background on the Sources of Islamic Regulation of Armed Conflict**

Primary sources of Islamic laws of war include the Qur’an, the Sunna and conduct of the prophet’s companions. Due to the complexity of Islamic law sources, it is difficult to discern the rules of conduct from mere examination of the sources, since many of the sources can be understood at face value to contradict each other. For example, some Qur’anic verses instruct Muslims not to wage wars of aggression, while others are interpreted to allow for offensive war to spread the religion.<sup>1</sup> Some scholars have argued that such a discrepancy is caused by the evolution of the Islamic mission from the Meccan era to the Medinan era. Verses of the Qur’an are generally divided to verses revealed in Mecca and verses revealed in Medina. Those who support the position of war unconditioned on aggression argue that verses limiting legitimate use of force to defensive wars were Meccan verses that were revealed when Muslims were the weaker parties, whereas other unlimited verses – referred to as the sword

verses – were revealed in Medina and thus hold more weight because later verses abrogate earlier ones.

Classical Muslim Koran Interpretation...regarded the Sword Verses, with the unconditional command to fight the unbelievers, as having abrogated all previous verses concerning the intercourse with non-Muslims. The idea is no doubt connected with the pre-Islamic concept that war between tribes was allowed, unless there existed a truce between them, whereby the Islamic Umma took the place of the tribe.<sup>2</sup>

It should be noted that the majority of rules on regulation of armed conflict are derived from the Sunna rather than the Qur'an because the battles fought by the prophet and his companions after him offered the jurists with rich material to resort to in developing this legal regime. But, these sources are not any more determinant than the Qur'an and are equally likely to be interpreted in conflicting manners. For example, the prophet is reported to condemn the killing of women and children in more than one occasion, but is also reported to have accepted the death of women and children during night raids.<sup>3</sup> Some jurists reconciled this conflict by arguing that the prophet rejected targeting of women and children but accepted their unintended death in the course of fighting.<sup>4</sup> But in one incident, the prophet is said to have seen a female body to have condemned it saying that the woman would not have been fighting without making any distinction between intentional and unintentional killing.<sup>5</sup>

## **2. The Unique Role of Scholars in Shaping Islamic Laws of War**

Complexity of the sources necessitated interpretation by the jurists in order to come up with a coherent legal system. Furthermore, considering that Islamic law did not originate from a secular framework, but rather revealed from the divine and translated to the world through juristic interpretive tools, the role of the state was minor compared to the International legal system.

The Islamic jurists did not treat the conduct of the state as a source except in the rare cases of governments that were headed by exemplary rulers, like the rightly guided caliphs of the Sunnis and imams of different Shi'i groups....In

consequence, the Islamic tradition on war and peace issues become seriously estranged from the rules embodied in the actual conduct of state.<sup>6</sup>

Due to lack of reliance on state practice in the earthly formulation of the legal framework, scholars predominantly played a major role in translating Islamic sources into a legal system. However, contemporary scholarship did not give enough emphasis to the roles played by the scholars. Many focused on the similarities or difference in application between Islamic law and international humanitarian law. In doing so, they ignored the processes of scholarly development of the law and focused on the outcomes.

As argued by Hallaq, classical and medieval Islamic legal scholars showed a high level of originality that was influenced by the scholars' worldliness.<sup>7</sup> However, scholarly intervention in the development of a coherent legal system for the conduct of warfare took the form of a highly legalistic approach that significantly affected the outcome of the legal system. For example, abrogation is a sophisticated legal tool relying on the chronology and occasion of texts, whereby later texts abrogate the legal sanction of earlier texts. In the creation and utilization of these tools, scholars can fairly be assumed to have responded to the context they were living in such as the tribal nature of the society and its impact as highlighted by Peters even if the context is ignored in their explicit analysis. As mentioned by Abou El Fadl, Islamic law, though divine, was semi-autonomous because the role played by the scholars, was "influenced by theological imperatives and socio-political demands, but it [was] articulated, constructed and asserted by jurists who belong to a common, although not uniform, culture."<sup>8</sup>

### **3. Distinction between Different Areas of the Legal System**

Unlike international law, Islamic law does not address the matter of conduct of hostilities in a distinct area of law as with international humanitarian law, which complicates the task of the researcher of Islamic law because of the need for general knowledge of the

Islamic legal heritage in order to fully comprehend the rules governing armed conflict, whereby general principles of law have an impact on many branches of the legal system. Conduct of hostilities has traditionally come under one of two sections in works by Islamic scholars, namely *siyar*<sup>9</sup> and *jihād*.<sup>10</sup> Scholarly attention to the matter has varied across schools and eras. However, it can be stated that while Ibn Ḥanbal and Mālik gave little attention to the matter, Shāfi‘ī and the *Ḥanafīs*<sup>11</sup> provided the legal discourse with significant works.

In the formulation of this field of Islamic law, scholars, like most areas of Islamic law, have relied on the regular sources to determine obligations through their regular process of reconciliation between the sources. This process of reconciliation led to some difference in opinions between jurists with regards to treatment of various groups.

#### **4. Types of Conflicts**

Islamic laws of war are divided into four main subcategories: fighting non-Muslims who are not followers of one of the holy religions, fighting scripturaries (believers in one of the holy books, the Torah and the Bible, and according to some the Zoroastrians), fighting apostates, and finally fighting rebelling Muslims. While some rules apply for all wars, Islamic jurisprudence separates distinctively between these four groups and addresses each of them separately. The below section will address these four regimes in its analysis of the principles of Islamic laws of armed conflict.

#### **5. God and Sovereigns**

One of the main differences between Islamic law and international humanitarian law is the notion of sovereignty. As Majid Khadduri stated, the international legal system is “[m]ade up of sovereign states in the sense that each one of them has supreme authority within its specified territory and is under no foreign control,”<sup>12</sup> and within that system of the “so called

family of nations....every member-state agrees to enter into intercourse with other members of the family,”<sup>13</sup> whereas Islamic laws of war are “part of a Muslim divine law designed to bind the Muslims in dealing with non-Muslims.”<sup>14</sup> In other words, while one system consolidated as an outcome of the collective wills of sovereign states, the other was perceived as an outcome of the divine revelation binding only on Muslims in their relations with others.

## **6. Protected Interests**

The difference in origin reflected a difference in interests protected and revered by each legal system. Since international humanitarian law is a part of international law and is accordingly organized around the notion of sovereignty, state interest is of ample importance. As stated by the International Red Cross, IHL was formulated when “[s]tates have agreed to a series of practical rules, based on the bitter experience of modern warfare. These rules strike a careful balance between humanitarian concerns and the military requirements of States.”<sup>15</sup> This pragmatic system collectively agreed upon by the sovereign states who were parties to IHL’s legal instruments has served these states’ interests and regulated war to the extent they wished.

On the other hand, Islamic jurisprudence is representative of a divine law “aspiring to establish on earth the kingdom of God.”<sup>16</sup> As an area of a divine law, Islamic laws of war with their universal inclusive agenda, rather than promoting the shared objectives of sovereign states, aim at the promotion of the Islamic mission, with supreme importance laid on Muslim interest.

## **7. Promoted Interests in the Two Legal Systems and the Other**

This difference in the theoretical framework is most evident in addressing internal armed conflicts in both regimes. In the case of IHL, states were keen on maintenance of the legal principle of state sovereignty and therefore “[a] more limited range of rules apply to

internal armed conflicts,”<sup>17</sup> with only Common Article 3 and the additional second Protocol applying. In the Islamic “state,” where “citizenship” is based on belonging to one Muslim *umma* (nation) under the leadership of one Imam, Muslim jurists in their discussion of rebellion provided more protection to rebels than in the international counterpart, whereby Muslim “rebels are not liable for life and property damaged during rebellion if such destruction was incidental and necessary to rebellion”<sup>18</sup>.

This discrepancy in the treatment of armed conflict can be attributed to the foundational difference between the two regimes earlier mentioned. In the case of IHL, states were interested in regulation of warfare among them, but were reluctant to dismiss their sovereignty to the degree of allowing internal groups to threaten or destabilize them on the domestic level. But Islamic law, originating from the divine and articulated by jurists, was more willing to grant rebellion more legitimacy because of Islamic law’s important mission of protecting Muslim subjects. The life and property of a Muslim, even if a rebel, are sacred and cannot be threatened except in the course of fighting for regaining stability in the nation.<sup>19</sup>

Supremacy of protection of Muslim life can be further proven from the emphasis on the rebel being a Muslim. This emphasis accordingly precludes the inclusion of apostates within the framework of rebellion, because the commission of the act of apostasy automatically excludes them from the Muslim nation and allows for different rules applying to them in the conduct of warfare. Shāfi‘ī<sup>20</sup> and the *Ḥanafī* School agreed that it is a duty to fight apostates and kill them until they repent. While the *Ḥanafīs* provided several qualifications for the killing of apostates, they still agreed on the obligation to kill them. In accordance with the prohibition of killing women, Sarakhsī, a *Ḥanafī* scholar and the compiler of Shaybani’s *Siyar*, stated that apostate women should not be killed.<sup>21</sup> Further, Sarakhsī set a qualification for killing apostates, which is being given a chance to repent and refusing to do so.<sup>22</sup> Sarakhsī

also seemed to adopt a position of qualifying apostasy as a declared one, because he uses a *Ḥadīth* by the prophet denying the actions of Usāma ibn Zayd for killing a non believer who voiced *shahāda* “declaration of belief in God and Muhammad as his prophet”. While Usāma ibn Zayd argued that the man only pronounced the *shahāda* to avoid killing, the prophet responded that it is impossible to get into one’s heart and that the tongue speaks for what’s inside the heart.<sup>23</sup>

While apostasy in the modern world can be seen as a form of dissent against the principles of a theocracy, or in other words, a rebellion, Islamic law does not treat it as such, because the law is not solely governed by the nature of the act, but by the identity of the actor as well. In case the dissenting fighter is a Muslim, the legal regime is shifted towards stronger protection. As mentioned by Abou El Fadl, the law of rebellion was a late comer to Islamic law as a reaction to situations of rebellion, where Shāfi‘ī provided the first “systematic exposition.”<sup>24</sup>

Shāfi‘ī’s recognition of rebellion (*baghy*) is dependent on the number of rebels and whether they are significant or not. If the number is not significant, the regime does not apply to them.<sup>25</sup> Because rebels are fighting over a matter of interpretation of the *Qur’an*, and they are at the end of the day Muslims, peace must be sought with them before fighting.<sup>26</sup> If they insist on rebelling, the ruler is constrained by measures only necessary to contain the rebellion. Thus, their life may only be endangered in the course of the fighting. If they repent or are subdued, they are not to be held responsible for the damage in life and property that they had caused during the course of the fighting. If they are wounded or caught retreating, they may not be killed and their women and children may not be enslaved.<sup>27</sup>

Contrary to Shāfi‘ī’s silence on legitimacy of rebellion, Sarakhsī adopted a more renounced position on rebellion. His section on rebellion is titled “*Khawārij*”. The *Khawārij* started with a group of fighters who rejected Ali’s acceptance of arbitration in the first *fitna*<sup>28</sup>



and are generally perceived to have committed a major sin for doing so.<sup>29</sup> He also starts out the chapter by stating that rebellion is a sin and that Muslims should not engage in it, but if Muslims had to fight, they must fight with the just ruler.<sup>30</sup> Despite this rejection of rebellion, Sarakhsī upholds Shāfi‘ī’s position in many matters relating to rebellion. Again, the rebels should be given a chance to repent and if they do, they are not to be held responsible for life and property<sup>31</sup> and their women and children may not be enslaved.<sup>32</sup> However, while the wounded are not to be killed, rebels may be killed in retreat if they are retreating to reunite.<sup>33</sup> Moreover, if *dhimmīs* (scriptuaries) fight with the rebels, they do not lose their status, because they were fighting with Muslim groups.<sup>34</sup>

In other words, both schools, despite their difference over the definition of apostasy or the morality of rebellion, agree on the protection of the life and property of the Muslim and the limitation on the power of the *Imām* (the leader) in fighting rebellion. At the same time, they also agree that the apostate’s life must be taken as a punishment for changing his Muslim identity.

This change in identity not only prevents the apostate from benefiting from the legal regime protecting rebels, it even puts him in a less advantaged position than some non Muslims. Non Muslims are divided into two groups, *dhimmīs* and others. The major distinction between *dhimmīs* and other non Muslims lies in the difference in options afforded to each one of them if they surrender. While scriptuaries are allowed to choose between Islam, fighting and paying *Jizya* (a tax paid annually once they are subdued), other non believers are to choose between one of two alternatives – fighting and Islam – and may not be allowed to pay the *jizya*. While Shafi‘ī argues the *jizya* option may not be granted to other non believers regardless of their geographical location,<sup>35</sup> the *Ḥanafīs* argue that only Arab non believers are not afforded such an advantage and that non-scriptuaries from outside the Arab peninsula may be allowed to pay the *jizya*.<sup>36</sup> This difference of opinion over the *jizya*

payment arises from the special interpretation each afforded to the prophet and the companions' acceptance of *jizya* from people of the Zoroastrian religion, predominant in Persia. While the *Ḥanafīs* relied on the acceptance of *Jizya* from Zoroastrians to connote expansion of the *jizya* regime, Shāfi'ī argued that Zoroastrians were considered people of the book and relied on a statement made by Ali to that effect.<sup>37</sup>

Accordingly, while a non Muslim *dhimmi* is allowed to pay the *jizya* and therefore prevent the damage to his life and property, a Muslim convert from Islam to Christianity or Judaism may not be allowed to pay the *Jizya* according to both scholars and is therefore put in the same legal position as non-scriptuaries in the case of Shāfi'ī, or Arab non-scriptuaries in the case of Sarakhsī. This inferior position of the *dhimmi* apostate can be understood only in light of the protection of Muslim interest, earlier mentioned to have influenced this legal system. While Islamic jurisprudence tolerates people of the book and allows for their coexistence in Muslim lands, it refuses to do so with an apostate because of his offense to the religion and the threat he poses to solidarity of the religious nation. In other words, while scriptuaries have not endangered Muslim interests by maintaining their religion, apostates are believed to have done so by reversing the universal mission of Islam.

## **8. Targeting and Protected Groups**

The importance of the protection of the Muslim interest and its mission of spreading Islamic religion is also highlighted in scholarly work on the conduct of war with non Muslims. Aside from the *jizya* distinction between scriptuaries and non Muslims, the approach was similar in the treatment of subjects in both wars with principal matters almost unanimously agreed upon by most scholars, namely the justification of killing men and the prohibition of killing women and children in fighting non-Muslims. Mālik, *Ḥanafīs* and Shāfi'ī held that women and children may not be targeted in war, because the prophet has given instructions not to kill women and children.<sup>38</sup> Despite the agreement on not killing

women and children, scholars have interpreted this prohibition to be a prohibition on targeting rather than on killing. Both Shāfi‘ī and Sarakhsī agree that women and children may be killed in the course of the fighting if they are not targeted. For example, Shāfi‘ī relied on an incident in which the prophet was asked about the consequences of night raids and whether the raiders would be held accountable for their death and the prophet responded that “they are from them”<sup>39</sup> and accordingly can be killed in the process.

It can also be argued that the use of weapons of a non-discriminatory nature was not prohibited. Sarakhsī and Shāfi‘ī stated that weapons such as hurling machines may be used against non-Muslims if they are hiding in a fort and women and children happen to be hiding with them.<sup>40</sup> They also agreed that burning of palm trees may also be used in the course of fighting.<sup>41</sup>

Moreover, scholars disagreed on the protection afforded to old men and the prohibition of cutting trees. While the *Hanafīs* argued that older men should not be killed because Abu Bakr instructed the army not to kill older men, priests and monks,<sup>42</sup> Shāfi‘ī argued that older men may be killed because a one-hundred-and-fifty-year-old man was killed in one of the battles at the time of the prophet, but there was no reprimand from the side of the prophet.<sup>43</sup>

This position taken by scholars on the life of women, children and older men can be perceived as a cost benefit analysis of the killing of these two groups. We cannot claim that this cost benefit analysis precludes a chivalrous and moral dimension to the renunciation of harming the vulnerable and the weak. However, the qualification of this harm portrays such a pragmatic position. The principle prohibiting the targeting of women and children weighs the renounced act of killing women and children against the possible gains from breaking the enemy, winning the war, and accordingly fulfilling the universal mission.

It is also important to note that the fulfillment of the mission and the propagation of Islam is perceived to be of ample benefit not only to the Muslim nation, but to the enemy as

well. If Muslims win the war, the enemy is more likely to join the religion of Islam and enjoy the earthly and heavenly gains of such conversions. The belief in linking the fate of the adversary to a better future for the enemy if Muslims win the war is best seen in the treatment of the defeated or the surrendered army. While women and children may not be targeted for their lives, it is agreed that women and children of scriptuaries and other non-believers may be taken as slaves. However, in the case of scriptuaries, if they propose to pay the *Jizya* before fighting, the Imam is forced to accept the *Jizya* and he is forbidden to take the women, children and property of scriptuaries, according to Shāfi‘ī.<sup>44</sup> This position and its underlying belief in the promotion of Islam is best highlighted by Sarakhsī, who stated that the *jizya* system allowed for scriptuaries to live among Muslims, guaranteeing their exposure to Islam and eventual acceptance of its holy mission.<sup>45</sup>

## **9. The Bearers of the Legal Obligation**

Another difference between Islamic law and international law can be deduced from the above treatment of scholars to conduct of war. Obligation was always laid on the pious Muslim. In the case of apostasy and fights with non believers, Islamic law does not address the obligation of the adversary. More importantly, even in the case of the Muslim rebel, most scholars addressed the obligation of *ahl al-‘adl* (literally: the people of justice), and put no clear regulation for the conduct of the rebelling groups. This position taken by the jurists is in-line with the argument set by Khadduri that Islamic law as a divine law appealed to the individual’s moral and religious commitment to the legal system, where enforcement mechanisms are not primarily dependent on positivist legal tools but more on the religious obligation of the individual, where “[m]an can only obey, and in his attempt to consummate his obedience to law, he realizes his religious ideal.”<sup>46</sup> Because of the prerequisite adherence to Islamic law, the law addresses the obligation of the just party, or in other words, the party

functioning within the legal paradigm, and ignores the non-adhering groups regardless of the variation in the level of deviation from upholding the law.

## 10. Conclusion

This brief examination of Islamic jurisprudence in the area of armed conflict avoided the traditional comparative approach that focuses on the rules of conduct of hostilities and attempted to show the foundational differences between Islamic jurisprudence and IHL. Examination of different legal texts shows the wide diversity of Islamic law considering the role played by Muslim jurists in the development of the legal system whereby distinct schools and rulings were long accepted in the Islamic tradition. That role necessitates further detailed examination of the juristic culture and its approach to Islamic laws of armed conflict in order to fully comprehend this intricate and complex legal system. This paper attempted to do so and to shift the understanding of Islamic law from formalistic legal examination to contextual analysis whereby interests and objectives promoted by the jurists were highlighted.

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<sup>1</sup> PETERS, RUDOLPH, *Jihad in Classical and Medieval Islam*, 2 (1996).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> Muḥammad ibn Idrīs al-Shafīʿī, § 4, 337 (1993).

<sup>4</sup> *Id.* at 337.

<sup>5</sup> ABŪ ZAHRA, MUḤAMMAD, *Al-Ilāqāt al-Dawlīya fil Islām*, 98 (1964).

<sup>6</sup> ANN ELIZABETH MAYOR, *War and Peace in the Islamic tradition and International Law*, in *Jihad and Just War: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, ed. JAMES TURNER JOHNSON AND JON KELSAY, 196 (1991).

<sup>7</sup> WAEL HALLAQ, *Usul Al Fiqh: Beyond Tradition*, in *Law and Legal Theory in Classical and Medieval Islam*, 187 (1994).

<sup>8</sup> KHALED ABUL FADL, *Rebellion and Violence in Islamic Law*, 322 (2001).

<sup>9</sup> *Siyar* is a term that can be translated literally as “paths”. While its singular is normally used to refer to the life of the prophet in general, the term has been widely used by Muslim jurists to refer to the area of Islamic law relating to dealings with non-Muslims in both war and peace.

<sup>10</sup> Dealing with conduct of hostilities within the Jihad section should not indicate blending of conditions of waging war and the limitation on warfare. Despite coming under the same section as Jihad, limitations are set on warfare itself and how it is conducted.

<sup>11</sup> *Ḥanafī* scholars are used to demonstrating the school’s position regarding conduct of war, rather than referring to the founder of the school, because Abu Ḥanīfa’s work was lost and his opinions reached us only through the writings of his disciples. See Abū Yūsuf’s *Al-Kharraj*, Shaybani’s *Siyar* and Al Sarakhsi’s *Al-Mabsut*.

<sup>12</sup> MAJID KHADDURI, *The Law of War and Peace in Islam: A Study in Muslim International Law*, 118 (1940).

<sup>13</sup> *Id.* at 118.

<sup>14</sup> *Id.* at 120.

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- <sup>15</sup> International Committee of the Red Cross, *What is IHL*, at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What\\_is\\_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf). Last Accessed Dec 18, 2006.
- <sup>16</sup> MUHAMMAD HAMIDULLAH, *MUSLIM CONDUCT OF STATE*, 72 (1945).
- <sup>17</sup> International Committee of the Red Cross, *What is IHL*, *supra* note 15.
- <sup>18</sup> KHALED ABUL FADL, *supra* note 8 at 329.
- <sup>19</sup> John Kelsay, *Islam and the Distinction between Combatant and non-combatant*, in JAMES TURNER JOHNSON & JOHN KELSAY, *CROSS, CRESCENT AND SWORD: THE JUSTIFICATION AND LIMITATION OF WAR IN WESTERN AND ISLAMIC TRADITION*, 206 (1990).
- <sup>20</sup> MUHAMMAD IDRIS AL SHĀFI'Ī, *AL UMM*, § 4: 202 (1904).
- <sup>21</sup> MUHAMMAD IBN AḤMAD AL SARAKHSĪ, *AL MABSŪT*, § 10, 117 (2001).
- <sup>22</sup> *Id.* at 107.
- <sup>23</sup> *Id.* at 108.
- <sup>24</sup> KHALED ABUL FADL, *supra* note 8 at 147.
- <sup>25</sup> MUHAMMAD IDRIS AL SHAFI'Ī, *supra* note 20 at § 4: 136.
- <sup>26</sup> *Id.* at § 4: 137.
- <sup>27</sup> *Id.* at § 4: 139.
- <sup>28</sup> 'Alī was the fourth caliph after the death of the prophet. When the third caliph, Uthmān, was murdered, Ali took over. Mu'āwya, Uthman's cousin, requested that 'Alī prosecute the killers of Uthman before resuming power and Ali refused. Muawya rebelled against Ali, but requested a truce through which arbitration on the matter can be sought.
- <sup>29</sup> MUHAMMAD IBN AHMAD AL SARAKHSĪ, *supra* note 21 at § 10, 132.
- <sup>30</sup> *Id.* at 132.
- <sup>31</sup> *Id.* at 136.
- <sup>32</sup> *Id.* at 135.
- <sup>33</sup> *Id.* at 134.
- <sup>34</sup> *Id.* at 136.
- <sup>35</sup> MUHAMMAD IDRIS AL SHAFI'Ī, *supra* note 20 at § 4: 94.
- <sup>36</sup> MUHAMMAD IBN AHMAD AL SARAKHSĪ, *supra* note 21 at § 10: 9.
- <sup>37</sup> MUHAMMAD IDRIS AL SHĀFI'Ī, *supra* note 20 at § 4: 94.
- <sup>38</sup> See *Malik* in ANAS IBN MĀLIK, *AL-MUWATTA OF IMAM MALIK IBN ANAS : THE FIRST FORMULATION OF ISLAMIC LAW*, trans. Aisha Abdurrahman Bewley, 174 (1989). *Shafi'i*, *supra* note 20 at §4, 199, *Sarakhsi*, *supra* note 21 at §10: 8.
- <sup>39</sup> MUHAMMAD IDRIS AL SHAFI'Ī, *supra* note 20 at § 4: 199.
- <sup>40</sup> See SHĀFI'Ī, *supra* note 20 at § 4: 94 and SARAKHSĪ, *supra* note 21, at § 10, 37.
- <sup>41</sup> While Abū Bakr instructed the army not to burn trees, the prophet is reported to have authorized the burning of the trees of the Jewish Banū Naḍīr tribe. Scholars, accordingly, relied on the incident to permit the act.
- <sup>42</sup> MUHAMMAD IBN AḤMAD AL SARAKHSĪ, *supra* note 21 at § 10, 34.
- <sup>43</sup> MUHAMMAD IDRIS AL SHĀFI'Ī, *supra* note 20 at § 4: 157.
- <sup>44</sup> *Id.* at § 4: 103.
- <sup>45</sup> MUHAMMAD IBN AḤMAD AL SARAKHSĪ, *supra* note 21 at § 10, 87.
- <sup>46</sup> MAJID KHADDURI, *supra* note 12 at 7.