ABSTRACT
Balancing justice and long-term peace and security in a postconflict context is highly complex. This article discusses the challenges in Iraq’s post-IS (Islamic State) landscape. Based on a review of relevant Arabic, English and Persian academic scholarship on Islamic law and Islamic political science on accountability and transitional justice, it discusses what Islamic law dictates state authorities to do with detained suspects of atrocity crimes and terrorism and explores possibilities in Islamic law to balance justice and long-term peace and security. The article concludes that crimes against the state should, according to Islamic law, in principle lead to harsh punishments. However, that same body of law also provides for opportunities to adopt non-retributive alternatives, if this allows government to more swiftly handle the security crisis, re-establish public harmony and prevent further bloodshed in the future. The popular perception of the Iraqi people supporting retributive approaches could however pose an important barrier that could block any changes to Iraq’s current transitional justice approach.

KEYWORDS: Accountability, Iraq, Islamic law, peace, repentance, transitional justice

INTRODUCTION
Balancing justice and long-term security in a postconflict context is already complex in a secular state, but arguably even more complex in theocratic or highly religious states in which both state and non-state actors contrive their responses based on religious or ideological prescriptions. A sense of revenge among victims, combined with religiously recommended prescriptions of postconflict justice, may be a poisonous tree which can justify violence in the name of justice and futile alternative transitional justice mechanisms. Iraq’s post-IS (Islamic State) landscape can serve as an explicit illustration of this tension. Over the last years the Iraqi government has detained and prosecuted thousands of mainly Sunni citizens for terror-related offenses.1 This has been accompanied by a free pass for religious paramilitary groups to establish their...
own version of justice. Illustrative of the important role of religious actors in Iraq’s transitional justice context is that Karim Asad Ahmad Khan, head of the United Nations investigative team to promote accountability for crimes committed by IS (UNITAD), has been seeking religious leaders’ support ‘to foster solidarity, compassion and cohesion amongst the various parts of Iraq and to create an environment conducive’ to his mission. On 23 January 2019, he even met Grand Ayatollah Ali Al-Sistani, the highest-ranking Shia religious authority in Iraq.

Taking into account that Islamic jurisprudence shapes the views and behavior of religious leaders – and more specifically non-state armed actors who play such an important role in Iraq’s postconflict setting – there is an obvious need to analyze the potential of Islamic law to balance justice and peace in a postconflict and post-terror era. Taking post-IS Iraq as a case study, this article discusses what Islamic law dictates state authorities and non-state actors involved in Iraq’s postconflict justice do with detained suspects of atrocity crimes and terrorism and explores what possibilities Islamic law offers to balance justice and long-term security.

In this article, Islamic law is used in a broad sense and interchangeably with Islamic jurisprudence which includes all the practical regulations and rules of the Shari’a stated and discussed by Islamic jurists. In terms of geographical scope, this article addresses the (non-)judicial policies adopted by (non-)state actors in the territory of Iraq since the defeat of IS in 2017. These judicial policies have been mainly taken in regard to (detained) suspected IS affiliates or captured fighters accused of atrocity crimes and terrorism.

The article is based on a literature review of relevant Arabic, English and Persian academic scholarship on Islamic law, Islamic jurisprudence (Fiqh) and Islamic political science, accountability and transitional justice. We have relied on both Sunni and Shia Islamic resources (traditional and modern ones) and have aimed to analyze these equally and neutrally. Furthermore, in order to properly address the religiously divided views of Muslim communities, we mostly relied on consensual approaches/opinions from all major schools of Islamic jurisprudence which have already been accepted by both sides.

The article is divided into four sections. The first section provides an overview of the general principles/laws of Islam on accountability for rebels and fighters. The second section elaborates on postconflict accountability in Iraq and discusses how alleged perpetrators of atrocity crimes and terrorism are held accountable. The third section explores how Islamic jurisprudence can be useful in developing a tailored and more balanced transitional justice framework in countries with a strong Islamic jurisprudence tradition.

March 2018, https://apnews.com/abee6571de54f5dba35f3d9de6381/Iraq-holding-more-than-19,000-because-of-IS,-militant-ties (accessed 15 August 2020).

2 Mara Redlich Revkin, ‘The Limits of Punishment, Transitional Justice and Violent Extremism (Iraq Case Study),’ United Nations University – Centre for Policy Research and Institute for Integrated Transition, 2018.

3 Rudaw, ‘Sistani Backs UN Investigation into ISIS Crimes,’ 23 January 2019, https://www.rudaw.net/english/middleeast/iraq/230120193 (accessed 6 July 2020).

4 UNIRAQ, ‘Mr. Karim A.A. Khan QC, Special Adviser and Head of UNITAD Meets with His Eminence Grand Ayatollah Ali Al-Sistani,’ 24 January 2019, https://uniraq.org/index.php?option=com_k2&view=item&id=9832:mr-karim-a-a-khan-qc-special-adviser-and-head-of-unitad-meets-with-his-eminence-grand-ayatollah-ali-al-sistani&Itemid=605&lang=en (accessed 6 July 2020), para. 2.
presence. Finally, the last section discusses the applicability of such a framework in post-IS Iraq. The article concludes that while Islamic law, in principle, prescribes harsh punishments for rebels and fighters, it also provides for opportunities to adopt non-retributive alternatives if this allows government to more swiftly handle the security crisis, re-establish public harmony and prevent further bloodshed in the future.

**POSTCONFLICT ACCOUNTABILITY AND ISLAMIC LAW**

Islamic law does not recognize the concepts of ‘war crimes,’ ‘crimes against humanity,’ ‘genocide’ or the ‘crime of aggression’ as defined in international criminal law. Neither does it recognize the concept of ‘terrorism.’ Instead, it differentiates between two types of crimes that can be committed in times of war and/or that may challenge the state: 1) crimes against individuals and 2) crimes against the state (or ‘crimes against security’).

**Crimes Against Individuals**

Islamic law acknowledges that civilians may in times of war – similar to in peacetime – be victimized, for example by being murdered, raped or robbed. Such crimes that violate the ‘Rights of People’ – or Haqq al-Nās – can, but do not necessarily have to, be revenged. Victims have a significant role in the prosecution and punishment of perpetrators of these types of crimes, particularly with regards to intentional homicide and crimes against the body (bodily injury).\(^5\) Victims or their family members have substantial discretion to ask for one of the following options: Qisas (punishing a perpetrator with the same act in retaliation; the ‘eye for an eye’ principle), Diyyā (blood money or compensation which can be requested in the case of waiving the infliction of the similar harm on the perpetrator) and finally simply forgiving the offender, or so-called Afw.\(^6\)

**Crimes Against Security: Baghy and Hirāba**

Within the framework of Islamic law, a declaration of war or a contribution to any act of terrorism or a military operation against the state is considered a severe crime.\(^7\) These are considered crimes against (state) security. In principle, perpetrators of these crimes are prosecuted based on special laws and legal policies. While Islamic law generally takes a victim-centered approach in dealing with crimes committed against individuals (as discussed above), victims are not expected to be engaged in dealing with crimes against security.\(^8\) Instead, rulers are to decide what will happen to perpetrators of these crimes. After a conflict, there can thus be two separate legal trajectories: one instigated by victims with regards to crimes against individuals and

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5 Seyed Jamal Hosseini and Ali Bahraminezhad, ‘Jurisprudential Analysis of Forgiving in Islamic Citizenship Rights,’ *Medical Law Journal* 12(46) (2018): 235–254 [in Persian].

6 Mohamed A. Arafa, ‘Islamic Criminal Law: The Divine Criminal Justice System Between Lacuna and Possible Routes,’ *2 Journal of Forensic and Crime Studies* 102 (2018): 1–8.

7 Mohd Farid bin Mohd Sharif, ‘Baghy in Islamic Law and the Thinking of Ibn Taymiyya,’ *Arab Law Quarterly* 20(3) (2006): 289–305; Etim E. Okon, ‘Hudud Punishments in Islamic Criminal Law,’ *European Scientific Journal* 10(14) (2014): 227–238.

8 Susan C. Hascall, ‘Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?’ *Berkeley Journal of Middle Eastern and Islamic Law* 4(1) (2011): 35–78; Arafa, supra n 6.
another instigated by the ruler regarding crimes against security. Being acquitted or exonerated with regards to one charge will not automatically lead to a similar result for the other one.

Within the framework of Islamic political doctrine, particularly the Shia version, religion and politics are intrinsically connected and maintaining the stability of the Islamic state is an overruling principle. A stable Islamic government – even when installed by means of democratic elections and run by professional secular politicians rather than the clergy – which allows for practicing Islam in a broad sense and enforcing Shari’a law is deemed essential. Any crimes which jeopardize the security and stability of the state therefore need to be responded to harshly.

Islamic law does not differentiate between contributing to non-international or international armed conflict and acts of terrorism or other crimes against security, and categorizes all these activities either as Baghy (rebellion) or Hiraba (unlawful warfare). The core idea of both crimes is the same: waging unlawful war against the existing state or ruler and disturbing the peace. Some branches of Islamic jurisprudence use the terms interchangeably, but most branches clearly differentiate the two. Baghy is then considered an ideologically motivated crime by individuals seeking governmental change, while perpetrators of Hiraba have alternative motivations. Both crimes are considered to be very serious in nature, but Hiraba is considered to be the more severe.

The main litmus test for distinguishing between the two crimes is the extent to which the perpetrator has the intention to challenge the legitimacy of the state/leader. While bughat (people who commit Baghy) consider themselves as a legitimate group who strive to overthrow the existing – in their eyes illegitimate – government to establish a legitimate Islamic state, muharibin (those who commit Hiraba) make no claims regarding the legitimacy of the status quo or the future. Muharibin may, for example, wage war for personal profit or due to ethnic hatred.

Certain conditions should be met before a group can be considered to commit Baghy. For example, some Shia jurists have the conviction that the definition of Baghy is only applicable when the perpetrators have rebelled against an Islamic state under the leadership of a fair and just Islamic Imam (ruler) who has divinely bestowed power free from error and sin. On the contrary, Abu Zakaria Yahya Ibn Sharaf al-Nawawi, a well-known Sunni Shafi’i jurist and hadith scholar, argues that it is forbidden – and therefore Baghy – to fight against any Muslim rulers, no matter if they are unjust or wicked. To complicate matters, Imam al-Sarakhsi, a Sunni jurist,

9 Ahmad Vaezi, Shia Political Thought (London: Islamic Centre of England, 2004).
10 Esma’il Rahiminejad and Mohaddetheh Safarkhani, ‘Study of Baghy in Imami Jurisprudence and Iranian Law,’ Islamic Law 11(40) (2014): 105–133.
11 Nik Rahim Nik Wajis, ‘The Crime of Hiraba in Islamic Law’ (PhD diss., Glasgow Caledonian University, 1996); Sadia Tabassum, ‘Combatants, Not Bandits: The Status of Rebels in Islamic Law,’ International Review of the Red Cross 93(881) (2011): 121–140.
12 Ibn Qudamah, Al-Mughni (Beirut: Dar Ehya Al-toras Al-Arabi, 1985).
13 Zayn al-Din al-Juba’i al’Amili, Ar-Rawda-l-Bahiyah fi Sharh allam’a-d-Dimashqiya (Qom: Maktabh al-Davari, 1989) [in Arabic].
14 Syed Abul Ala Mawdudi, and Zafar Ishaq Ansari, Towards Understanding the Qur’an (Leicester: Islamic Foundation, 1988).
states that when Muslims have already ‘agreed on a ruler’ and when there is peace under their leadership, a rebellion would be considered as a crime of Baghy.16

Hirāba is considered a Hudud crime, which is a category of divinely prescribed offences in Islam.17 Punishments for Hudud crimes, as offences against God and/or public justice, have been clearly prescribed by the primary Islamic resources.18 Once they are proven in court a judge will be divested of any discretion in the matter and there would be no choice but execution of preset punishments.19 According to the general rule of Hirāba – as is prescribed in the Quran – fighters who have fought, murdered people or been captured while they were engaged in Hirāba should be punished by one of the following methods:20

Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment. (Quran, 5:33)

Based on the above verse of the Quran a judge is thus limited to choose one of four penalties: execution, amputation, crucifixion or forceful exile.21 The punishment must be immediately implemented and judges cannot change it – neither lessening it nor making it harsher.22 However, it should be mentioned that for muharib who have killed someone during the war, the penalty of death would be mandatory.23

Punishment for Baghy is different from that for Hirāba, as Baghy is not considered a Hudud crime. For this crime too, however, the death penalty is in principle prescribed.24 There is a consensus amongst Islamic jurists that ideologically motivated Baghy fighters will typically not readily give up their fight, even in the case of defeat. They are considered to fight a ‘holy war,’ aimed to establish a just and fair Islamic state. In 21st-century terminology they would be regarded as ‘radicalized’ individuals or ‘extremists.’ Where Hirāba might be considered a more severe crime, there is a general understanding that bughat are, from the perspective of state security, the more dangerous perpetrators. Acknowledging the role of radicalization in Baghy, it is argued that bughat may even after defeat continue to pose a future threat to the state.25 Out of fear that these ‘radicalized people’ could after defeat on the

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16 Muhammad b. Ahmad al-Sarakhsi, Al-Mabsut (Beirut: Dar Elmarefah, 1993) [in Arabic].
17 Corri Zoli, M. Cherif Bassiouni and Hamid Khan, ‘Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition,’ Utrecht Journal of International and European Law 33(85) (2017): 38–61. DOI: 10.5334/ujiel.382.
18 Okon, supra n 7.
19 A.U.A.B. Al-Kasani and Bakr ibn Masʿud, Badaʾi al-Sanaʾi fi Tartib al-Sharaʾi (Beirut: Dar al-Kutub al-İlmiyyah, 1986) [in Arabic].
20 Arafa, supra n 6.
21 Jamal al-din M.A. Fazel Meghdad, Kanz al-ulufan fi fiqh al-Quran (Qom: Navid-e Islam, 2001) [in Arabic].
22 Wajis, supra n 11.
23 Ibid.
24 bin Mohd Sharif, supra n 7 at 289. It should be noted that there is a heated debate on the punishment of Baghy among Islamic jurists from different schools of Islamic jurisprudence.
25 Saeed Rouhani, ‘Khararij and Alavi State in view of Motahari,’ Journal of Farhang-e Kosar #54 (2002), haw-zah.net//fa/Magazine/View/4180/4780/39398 (accessed 13 July 2020) [in Persian].
battlefield regroup and reorganize, Islamic jurisprudence recommends to keep fighting them until the organization has been thoroughly destroyed.

The aforementioned prescribed penalties for Hirāba and Baghy have been (in)directly reflected in the criminal codes of various Islamic countries:

For example, article 282 of the 2013 Iranian Islamic Penal Code asserts that ‘The punishment of Hirāba (unlawful warfare) would be one of the following: execution, crucifixion, cutting off the right hand and the left feet or exile.’

Art 287 states: ‘Any group who commits an armed uprising against the basis of the Islamic Republic of Iran will be recognized as bughat and its members, in case of using weapons, will be convicted to death penalty.’ (Art 287)

Crimes Committed by Islamic State: Baghy or Hirāba?
As referred to above, establishing if an armed group commits the crime of Baghy or Hirāba is often subject to interpretation. It is therefore not surprising that the questions of what motivates fighters of IS and how to define their crimes have led to considerable discussion between both Sunni and Shia jurists.

The Association of Syrian Jurists stated that the crimes committed by IS should be defined as Baghy and that killing of IS members through battle is a religious duty. On the other hand, Ahmed Mohamed Ahmed al-Tayeb, the Grand Imam of al-Azhar University (Cairo) who is by some Muslims considered to be the highest authority in Sunni Islamic thought, has considered IS members as muharibin. Other Sunni scholars, like Diraniah, an expert in Islamic jurisprudence, take a more nuanced view and differentiate IS members based on their actions and attitudes over time:

When they started in 2013, they were Bughat ... then they started to bandit and kill a large number of people and torture ... they became Muharib and fighting and killing them was based on Hirāba ... They [IS] can be considered Bughat or Muharib or Khawarij in all the aforementioned cases, it is a religious duty to fight them either as Bughat or Muharib or Khawarij.

26 The Association of Syrian Jurists, ‘If Someone Tries to Kill IS and Gets Killed Would They Be Considered a Martyr?’ (2014), http://www.islamsyria.com/portal/consult/show/653 (accessed 6 July 2020) [in Arabic].
27 al-akhbar, ‘Between ISIS and Al-Nusra, Fight with Apostasy, Baghy or Hirbah,’ (2015) https://al-akhbar. com/Opinion/16333 (accessed 14 June 2020) [in Arabic].
28 Khawarij refers to a group that is involved in the disruption of the unity of Muslims and riot against the leader.
29 Mojahid Diraniah, ‘The Ruling for Fighting Bughat and Outsiders, Dealing with their Captives and Treating their Wounded ones,’ http://islamion.com/news%D8%A7%D9%84%D8%AD%D9%83%D9%85-%D9%81%D9%8A-%D9%82%D8%AA%D8%A7%D9%84-%D8%A7%D9%84%D8%A8%D8%BA% D8%A7%D8%A9-%D9%88%D8%A7%D9%84%D8%AE%D9%88%D8%A7%D8%B1%D8%AC-%D9% 84%D9%81%D9%8A-%D8%A3%D8%B3%D8%B1%D8%A7%D9%87%D9%85-%D9%88%D8%A7% D9%84%D8%A5%D8%AC%D9%87%D8%A7%D8%B2-%D8%B9%D9%84%D9%89-%D8%A7%D9% 84%D8%AC%D8%B1%D8%AD%D9%89/ (accessed 8 July 2020) [in Arabic].
To complicate matters, Gholam-Hossein Mohseni-Eje‘I, a Shia jurist and prosecutor general who currently serves as the second-highest official in the Judicial system of Iran, stated that whoever joins IS should be recognized as *muharib*, because IS has declared war and committed terrorist attacks.30 Davoud Mehdi Zadegan, an Iranian Shia jurist, took a more academic approach by referring to most IS members as *bughat* because of their intention to challenge the legitimacy of the state/leader:

Definitely, the act of *Baghy* committed by some of the extremists was not based on their consciousness and willingness. The majority of them were extremely tired of the living conditions in the country and also viewed the state as illegitimate and cruel. They joined terrorist groups to combat this illegitimate state.31

In sum, there are widely diverging views among Islamic jurists about how to define the crime against security committed by IS. This lack of clarity is not only interesting from a theoretical or academic perspective, but is also relevant in actual practice. As we will argue in the upcoming paragraphs, the ways the crimes of IS are interpreted can impact how detained IS affiliates are and can in accordance with Islamic law be held accountable.

**POSTCONFLICT ACCOUNTABILITY IN IRAQ: LAWS AND PRACTICES**

Above we discussed the varying interpretations in Islamic law in relation to the crimes committed by IS. In Iraq itself, however, no matter how influential the above-mentioned interpreters of Islamic law are, they are not the ones who decide how alleged IS affiliates have over the last years been dealt with. This paragraph discusses how the Iraqi army and paramilitary groups and Iraqi counterterrorism courts have so far treated alleged IS members.

**Iraqi Army and Paramilitary Groups**

Various reports from (inter)national organizations and NGOs report that the Iraqi army and paramilitary groups have been committing abuses against (detained) suspected IS affiliates or captured fighters. This ill-treatment has even led IS members to have reportedly been instructed by their commanders to only surrender to Kurdish forces, due to their reputation for taking prisoners rather than killing them.32 Arguably, the root causes for this retributive approach can be traced back to strong sentiments of retaliation. Illustrative of this are the words of an Iraqi

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30 Khabaronline, ‘Mohseni-Eje‘i: Those IS Affiliated Who Were Captured Are Accused of Muhariba,’ (2017), khabaronline.ir/news/678577 (accessed 6 July 2020) [in Persian].

31 Farhikhtegan Daily, ‘Critics to Khawarij Jurisprudence,’ (2019: para. 40), http://fdn.ir/35316 (accessed 6 July 2020). It however should be noted that it is not possible to readily classify all IS members as *muharib-bin* or *bughat* without taking into account personal factors (such as a fighter’s personal beliefs, committed crimes, etc.) and therefore a case-by-case approach is recommended. That said, one of the problems of transitional justice in Iraq is that the soldiers and actors on the ground might not be willing or able to take that case-by-case approach and may eventually stick to generalizations.

32 Revkin, supra n 2.
lieutenant: ‘I know some people believe that this kind of killing is wrong, but Daesh [IS], they are not human beings.’

Given statements by religious leaders and scholars that IS fighters can be considered *bughat* – which according to some interpretations would require them to be instantly killed without due process – it is not surprising that Iraqi soldiers and Yezidi and Shia paramilitary fighters find justification to engage in summary executions.

**Iraqi Anti-Terrorism Legislation and Counterterrorism Courts**

Similar to soldiers and paramilitary forces, the Iraqi government and its judicial branches have adopted a highly retributive approach with regards to alleged IS members. Illustrative is that Iraq’s Prime Minister Haider Al-Abadi in 2018 called for the swift execution of all convicted terrorists on death row in retaliation for IS’ crimes.

It should be noted, however, that this retributive approach is, in principle, not based on the above presented Islamic jurisprudence. The Iraqi legal system is secular in nature; new laws need to be approved by a majority of a democratically elected parliament and are interpreted by an independent judiciary.

At the same time, it should be acknowledged that the politicians who vote for laws and lawyers who interpret these laws do not operate in a vacuum. Many parliamentarians represent their religious groups, the majority of the Iraqi population are Muslims and religious leaders have over the past years – increasingly – impacted the political and legal debate. Moreover, it is constitutionally established that Islam plays a pivotal role in Iraq’s legislation:

> Article 2(1) of the Iraqi constitution states: ‘Islam is the official religion of the State and is a foundation source of legislation: (a) No law may be enacted that contradicts the established provisions of Islam.’

It is, in other words, not surprising that Iraq’s legislative framework to a large extent resembles or is inspired by Islamic law and teachings. Moreover, non-state paramilitary groups are very important actors in Iraq. Their behavior and actions are often directly influenced by the words and opinions of their religious leaders.

**The Anti-Terrorism Law**

According to Iraq’s Anti-Terrorism Law no. 13 (2005), the death penalty applies to, inter alia, a large number of crimes that range from acts of terrorism, crimes against the internal and external security and state institutions, any attempt to incite an armed rebellion, any act that threatens the national unity and

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33 Susannah George, ‘Iraqi Officer Admits to Executing Multiple ISIS Fighters in Mosul and Vows a “Slow Death” for His Family’s Killers,’ *Business Insider*, 20 July 2017: para. 36.

34 Mohammed Tawfeeq, Lauren Said-Moorhouse and Nick Paton Walsh, ‘Iraqi PM Orders “Immediate” Execution of All “Terrorists Condemned to Death”,’ *CNN*, 30 June 2018.

35 Section 3, chapters 1 and 3, Iraq’s Constitution of 2005.

36 Marsin Alshamary, ‘The Role of Iraq’s Influential Shiite Clerics Is Changing. Here’s How,’ *The Washington Post*, https://www.washingtonpost.com/news/monkey-cage/wp/2019/02/04/the-role-of-iraqs-influential-shiite-clerics-is-changing-heres-how/ (accessed 13 July 2020). There have already been some concerns about the growing influence of religious leaders in politics and decision-making processes, as it may fuel sectarian conflicts or tensions between modern constitutionalism and the role of religion / religious leaders in Iraq.

37 Anti-Terrorism Law of 2005 (Art. 2 to 4).
the safety of society and violence or threats which aim to bring about fear among people. This overly broad law does not differentiate between committing acts of terrorism and financing, supporting or assisting such acts. Subsequently, all direct and indirect participants of the crime will face the same harsh penalty: death.

In line with the above, a senior counterterrorism judge told Human Rights Watch he had a day earlier issued the death penalty to someone who had worked as a cook for IS. ‘His argument: “How could the ISIS fighter have executed someone if he had not been fed a good meal the night before?”’ The wide application of this article and broad scope of this law were already criticized well before IS rose to power.

### Hasty Counterterrorism Trials and Collective Punishment

Although reliable data is scantly available in the public domain, anecdotal evidence suggests that a considerable number of alleged IS affiliates have in recent years been prosecuted by counterterrorism courts. The conviction rate of these special courts – which typically hear up to 50 cases per day in sessions no longer than 30 minutes – is reported to be around 98 percent. Iraqi judges have publicly explained why they take this approach:

> A judge in Mosul, for example, stated: ‘Daesh [IS]’s ideology is so dangerous that we cannot afford to show any leniency even for those who were only believers and did not commit specific crimes.’

Sunni Muslims and their leaders have repeatedly asked for the release of certain categories of detainees and protested against unlawful executions and violations of prisoners’ rights. Sheikh Jamhour, leader of the Sunni Juburi tribe, argues that releasing prisoners could facilitate reconciliation and reintegration efforts in Iraq. Al Tuma, on the other hand, reports that 63 percent of Shia participants to a survey claimed to be satisfied with the speed of these courts.

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38 Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Report on the Death Penalty in Iraq,’ October 2014.

39 Article 4, Anti-terrorism Law no. 13, 2005.

40 Human Rights Watch, ‘Iraq: Flawed Prosecution of ISIS Suspects,’ [https://www.hrw.org/news/2017/12/05/iraq-flawed-prosecution-isis-suspects](https://www.hrw.org/news/2017/12/05/iraq-flawed-prosecution-isis-suspects) (accessed 6 July 2020), para. 10.

41 UN Iraq, ‘Pillay Condemns Rampant Use of Death Penalty in Iraq,’ [http://www.uniraq.org/index.php?option=com_k2&view=item&id=523:pillay-condemns-rampant-use-of-death-penalty-in-iraq&Itemid=605&lang=en](http://www.uniraq.org/index.php?option=com_k2&view=item&id=523:pillay-condemns-rampant-use-of-death-penalty-in-iraq&Itemid=605&lang=en) (accessed 15 Feb 2021).

42 Human Rights Watch, ‘Iraq: Key Courts Improve ISIS Trial Procedures,’ 2019, [https://www.hrw.org/news/2019/03/13/iraq-key-courts-improve-isis-trial-procedures](https://www.hrw.org/news/2019/03/13/iraq-key-courts-improve-isis-trial-procedures) (accessed 15 February 2021).

43 Tanya Mehra, ‘Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts’ (The Hague: International Centre for Counter-Terrorism (ICCT), 2018).

44 Revkin, supra n 2 at 19.

45 Human Rights Watch, ‘Iraq: Campaign of Mass Murders of Sunni Prisoners,’ 11 July 2014, [https://www.hrw.org/news/2014/07/11/iraq-campaign-mass-murders-sunni-prisoners](https://www.hrw.org/news/2014/07/11/iraq-campaign-mass-murders-sunni-prisoners) (accessed 18 September 2020).

46 Belkis Wille, ‘How Reconciliation in Iraq Could Stop Collective Punishment,’ Just Security, Reiss Center on Law and Security, New York University School of Law, 22 March 2018.

47 Al Tuma, supra n 1. For more details on this study, see paragraph 4.
Not only IS members themselves but also those who can otherwise be linked to IS have been adversely affected by judicial measures in the post-IS era. Family members of IS affiliates and even merely residents of IS-controlled territories have been impacted by judicial and non-judicial measures. There are reports of forced displacements, arbitrary detentions, forced relocation of women and children and other means of collective punishment carried out by the government of Iraq. Indeed, it seems that for Iraqi officials, justice for victims and fair treatment of IS affiliates or their family members cannot be established at the same time. Illustrative is a statement by Abdul-Sattar al-Birqdar, an Iraqi judge and judiciary spokesperson, who said:

Our job isn’t just to punish the criminals but to provide justice for the victims . . . To provide justice to these people is more important than the criminals who might kill tons of people in one second.

In sum, since the victory over IS, the Iraqi criminal justice system has been heavily criticized for inconsistencies in the judicial process, rushed and flawed trials, retaliatory and collective punishment, taking merely punitive measures, adopting low evidentiary standards and coming to unfair convictions based on scant evidence. The summary executions by the Iraqi army and paramilitary groups have equally been critiqued. Responding in such a rigid, harsh and retributive fashion is likely to fuel future sectarian violence and create a cycle of revenge. If the abuses continue, as Human Rights Watch researcher Belkis Wille argues, ‘all you’re going to see is (that) young Sunni Arab men are going to want to join whatever the next extremist group looks like.’ The aforementioned policies have already led to various protests by Sunnis and even Shias, particularly in the south of the country. This arguably provides fertile ground for IS to stage a comeback. Although IS lost its territory, its underground network of sleeper cells and dormant sympathizers are looking for new recruits. The currently deployed transitional justice practices provide new push and pull factors to fuel extremism. As the chancellor and top security official of Iraq’s semi-autonomous Kurdish Regional Government in 2018 warned: ‘They (IS members) are reorganizing and reactivating . . . we see them

48 Human Rights Watch, ‘Iraq: Alleged ISIS Families Sent to “Rehabilitation Camp,” Evictions, Detentions Amount to Collective Punishment,’ 2017, https://www.hrw.org/news/2017/07/13/iraq-alleged-isis-families-sent-rehabilitation-camp (accessed 16 August 2020).
49 Revkin, supra n 2.
50 Reuters staff, ‘Iraq Collectively Punishing Islamic State Families: Rights Group,’ Reuters, 13 July 2017.
51 Sophia Jones and Christina Asquith, ‘Iraq Is Tempting Fate by Punishing Women,’ Foreign Policy, 25 October 2018, para. 12.
52 Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors: Principle and Pragmatism in Strategies of International Justice,’ International Security 28(3) (2004): 5–44; Hunjoon Kim and Kathryn Sikkink, ‘Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,’ International Studies Quarterly 54(4) (2010): 939–963.
53 Susannah George, supra n 33, para. 7.
54 The New Arab, ‘The Iraq Report: Thousands of Children Tortured by Iraqi Authorities,’ 8 March 2019, https://english.alaraby.co.uk/english/indepth/2019/3/8/the-iraq-report-thousands-of-children-tortured-by-authorities (accessed 8 July 2020).
coming back. The ideology is there, and they continue to have large numbers of
followers."55

ISLAMIC LAW: BALANCING JUSTICE AND PEACE IN
POSTCONFLICT SETTINGS

The above description of the current situation in Iraq prompts the question if it is con-
ceivable and feasible to find inspiration in Islamic law to develop an alternative – less
retributive – accountability framework to deal with suspected IS members. A careful re-
view of Islamic jurisprudence shows that there is a variety of lesser known, possibly
even forgotten, interpretations of Islamic jurisprudence which would allow for a more
forward-looking accountability framework. Importantly, as such a framework is
inspired by – and in line with – ancient scriptures of Islamic law, it consequently has
the potential to garner the support of religious leaders as well as Iraq’s Muslim major-
ity, both Shia and Sunni. As we will argue below, Islamic law does not exclude – and in
some instances even promotes – the possibility of waiving punishment or replacing it
with rehabilitation for certain categories of repenting IS affiliates. It offers the possibil-
ity to punish accessories of war more leniently if doing so might promote the re-estab-
ishment of public harmony. As such, it has the potential to strike a better balance
between achieving justice for victims and promoting long-term peace and security.

Repentance in a Postconflict Context

An important first principle in the ‘toolbox’ of Islamic law is Tawba (repentance).
Tawba is understood to be a ‘turning-back point’ for wrongdoers or sinners. When
they feel regret or are filled with remorse for their sins or indecent acts, they may ask
for mercy or forgiveness from God.56 The concept plays a significant role in awaken-
ing the voice of moral conscience, and Muslims have been urged to realize their mis-
takes and repent immediately.57 This has been mentioned in various verses of the
Quran:

‘And turn to Allah in repentance, all of you, O believers, that you might suc-
ceed’ (24:31);
The repentance accepted by Allah is only for those who do wrong in ignorance
[or carelessness] and then repent soon after. It is those to whom Allah will
turn in forgiveness, and Allah is ever Knowing and Wise. (4:17)

Although the act of repentance is mainly discussed and developed as a moral trad-
ition with individual positive consequences for the heart and soul of the person, it
has also permeated the field of Islamic criminal law.58 Repentance, accompanied by a

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55 The Straits Times, ‘ISIS Still Deadly in Iraq and Syria, Say Experts,’ 21 December 2018, https://www.straitstimes.com/world/middle-east/isis-still-deadly-in-iraq-and-syria-say-experts (accessed 18 September 2020).
56 Syed Mu’azzam Husain, ‘Effect of Tauba (Repentance) on Penalty in Islam,’ Islamic Studies 8(3) (1969): 189–198.
57 Amitai Etzioni, Repentance: A Comparative Perspective (Lanham, Maryland: Rowman & Littlefield Publishers, 2000).
58 Husain, supra n 56.
set of conditions, can extinguish, lessen or even waive certain punishments. According to Islamic jurisprudence, only the punishments of Hudud crimes, including Hirāba, can be waived by repentance of the perpetrator. Muharibin – those who fight Hirāba (unlawful warfare) – can, in principle, have their punishment waived if they repent. Importantly, however, such repentance should be expressed before the perpetrator is apprehended. Directly after prescribing the four punishments for Hirāba, the Quran states:

‘[...] Except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful’ (Quran: 5: 33).

Repentance and Hirāba

Based on the abovementioned verse of Quran, there is a consensus among both Shia and Sunni jurists that in case of war and internal conflict, if the perpetrators of Hirāba repent before the government army apprehend them, there will be no punishment for them. Abdul Qadir Oudah, a well-known Islamic scholar, argues that there are two pieces of logic behind this condition: 1) generally, repentance after apprehension and arrest is not sincere, as the perpetrator will pretend to repent in order to escape punishment; 2) this condition can urge those who are fighting to stop fighting, repent and be free of any criminal charge. If fighters know that there is still a way to escape execution, they will be more willing to give up and stop fighting. This rule can in some way be equaled to contemporary policies providing amnesty for fighters who voluntarily give up their arms, as for example applied in Uganda’s Amnesty Act. It is important to note that some Islamic scholars, like Zakariyya Ibn Muhammad Ansari, a leading Islamic scholar of the 15th century, argue that even if perpetrators after apprehension claim that they have already repented, a judge can accept their claim if confirmation of this claim can be found in the evidence and circumstances. Furthermore, we should stress that repentance only waives the punishment for the crime of Hirāba, not the perpetrators' responsibility with regards to crimes against individuals. Victims may still demand retaliation (Qisas) or compensation (Diyaa).

59 Habibollah Taheri, ‘The Role of Repentance in Extinguishment of Hudud,’ Islamic Jurisprudence Research 6(2) (2010): 5–27.
60 It should be mentioned that crimes against individuals or their rights are excluded from Hudud crimes, which means that repentance and asking forgiveness from God can with regards to these crimes not directly commutate their punishment (Jahandar Amini and Mohammad Ali Taheri, ‘Repentance and Its Effect on Hudud: A Comparative Study in Islamic Jurisprudence and Islamic Penal Code of 2013,’ The Judiciary Law Journal 78(86) (2014): 35–61).
61 Mohammad hussain Fazaeli, ‘Theological and Legal Foundations of Repentance in Islamic Criminal Law,’ Judicial Law Views Quarterly (Law Views) 21 (2016): 73–100.
62 Seyyed Mohammad Musavi Bojnourdi, Comparative Jurisprudence (Criminal Law) (Tehran: SAMT, 2015) [in Persian].
63 Abdul Qadir Oudah, Al-tashrie al-jenayee al-Islami, Mogharenan bel ghanoun al-vazei (Cairo: Al-Tawfikiya Bookshop, 2009) [in Arabic].
64 Uganda’s Amnesty Act, 2000 (Part 2, Art 3 & 4).
65 Zakariyya Ibn Muhammad Ansari, Asna al-Matalib Sharh Rawd al-Talib (Beirut: Dār al-Kutub al-Ilmiyyah, 2001) [in Arabic].
66 Fazel Meghdad, supra n 21; Oudah, supra n 63.
The option to waive the punishment of repenting *muharabin* in a transitional justice context has so far been largely overlooked. It would, however, not be without precedent and has in the past already been used in postconflict situations. Iran in its post-1979 revolution era can be regarded as an explicit example of integrating this concept into transitional processes. After the revolution, the newly installed Shia theocracy saw itself confronted with the question of how to deal with prisoners of various paramilitary-political groups who had been recognized as *muharibin* by the then supreme leader of Iran for their engagement in attacks against the state.67 Nevertheless, Ahmadi Shahroudi, the then chief of the Islamic Revolutionary Court in Khuzestan Province, recently spoke about how death penalties had been waived because of repentance. In 2017 he stated that:

Sometimes prisoners [arrested people] deserved to be executed. However, we tried to reduce the number of executions to the necessary limit. We were asking them [prisoners on death row] to repent, because afterward [in the case of refusing to repent] the case would have been sent to the Supreme Court. After the confirmation of this court, the punishment would have been carried out . . . Generally, the Supreme Court confirms the punishment if the convicted has not repented.68

Although the total number of repenting and released detainees is unclear, some observers have argued that based on the policy to waive the punishment of repenting convicts, thousands of detainees have escaped execution.69 Over the years there has been heated debate about the results of this process among Iranian scholars, politicians and human rights activists. While some have praised the policy and its results, others criticise the practice, arguing that detainees have been forced to repent, as those who resisted were executed.70 A more recent illustration of waiving punishment of repenting *muharabin* also concerns Iran. The latest revised Islamic penal code explicitly refers to repentance in waiving *muharibs*’ punishment prior to capture: The repentance of muharib before his/her arrestment or getting surrounded [by police/army] will waive the punishment [Hadd].71

**Repentance, Baghy and the Interest of Public Harmony**

As stated above, *Baghy* is not considered a *Hudud* crime. However, there is consensus among Islamic jurists that also for actions considered to be *Baghy* repentance can mitigate punishment. Although, as referred to above, the Quran prescribes fighting

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67 Hussein-Ali Montazeri, *Khaterat Ayatollah Hosseinali Montazeri* (Pacoima, CA: KETAB Corp, 2001) [in Persian].
68 *Tasnim News*, ‘Mojahedin Said If We Were Released, We Take Guns . . .’ 8 August 2017, https://tn.ai/1474271, para. 35 [in Persian].
69 *Tasnim News*, ‘Thousands of Detainees Have Been Forgiven . . .’ 24 July 2017, https://tn.ai/1465191 [in Persian].
70 Fereidoun Ghassemi, *The Islamic Republic of Iran: From Bazargan to Rouhani* (London: H & S Media, 2016); Ibid.
71 Art 114(1), Islamic Penal Code 2013.
bughat by all means and sentencing them to death, it also unequivocally states that the highest objective in fighting bughat is making peace.

The stability and security of the state are the most fundamental principles of Islamic politics. The ultimate purpose of combatting bughat is to put an end to chaos and to re-establish peace and order in society. There is consensus among Muslim jurists that ending a rebellion peacefully and re-establishing public harmony are the first priority of the state, overruling the importance of punishing bughat.72 It is acknowledged that a highly retributive approach with regards to bughat can fuel a cycle of revenge-seeking and subsequently worsen the security situation.73 Many jurists have stated that punishment of bughat may be reconsidered if their group is already disbanded and if there is no organization anymore.74 One of the conditions for a group to be considered Baghy is that they should have a certain level of organization and be influential and powerful enough to challenge the state.75 If such a level or organization does not exist anymore and if a group is no longer powerful enough to challenge the state, one could argue that punishment of bughat may be reconsidered.

Different from punishing muharibin, which is for revenge and retribution, the goal of punishing bughat is first and foremost to prevent further bloodshed.76 This higher objective in fighting bughat – peace – is mentioned in the Quran:

If two parties of the believers happen to fight, make peace between them. But then, if one of them transgresses against the other, fight the one that transgresses until it reverts to Allah’s command. And if it does revert, make peace between them with justice, and be equitable for Allah loves the equitable.

(Quran, 49:9)

‘Reverting to Allah’s command’ is an important term in this verse. Towards Understanding the Quran, an authoritative book on the interpretation of the Quran, points to the following meaning and scope of this term:

This shows that the fighting is not meant to punish the rebel (the transgressing party) for his rebellion (aggression), but to force him to return to the command of Allah. [...]. As soon as a rebel group becomes ready and willing to follow this command, use of force against it should be stopped, for this is the actual object of the fighting and its target. The one who commits an excess after this would himself become the aggressor.77

Influential Muslim jurists state that the aforementioned verse of the Quran implies that a government cannot initiate military operations against bughat before

72 al-Shâfi’i, Kitab al-umm (Beirut: Dar al-Fikr, 1983) [in Arabic]; Abdullah al-Tayyar, Al-Fiqh al-moyasar (Riyadh: Madar al-Watan lil Nashr, 2011) [in Arabic]; Tabassum supra n 11.
73 bin Mohd Sharif, supra n 7.
74 Oudah, supra n 63; Ibid.
75 al-Hilli, supra n 13.
76 Ibn Muflih al-Maqdisi, Al-mubdi’ fi sharh al-muqni’ (Beirut: Dar al-Kutub al-Ilmiyyah, 1997) [in Arabic].
77 Mawdudi et al., supra n 15 at 49(9), point 15.
asking the rebels about their reasons for the rebellion, negotiating with them and inviting them to a settlement.\textsuperscript{78} If they refuse the writ of the government, military attacks against them would be permissible; however, only to the extent necessary for destroying their organization, not to assassinate them.\textsuperscript{79}

According to Oudah, ending the conflict is the only reason for justifying the killing of rebels during war.\textsuperscript{80} When the conflict is over and the existing government re-controls the situation, there would be no ground for punishing them.\textsuperscript{81} Similarly, Ghazi Abu Yusuf, a famous Sunni jurist, states that in the Battle of Basra (so-called Battle of the Camel, in 656 AD), Ali ibn Abi Talib, the fourth caliph, not only did not kill anyone who surrendered or took refuge in houses, but also did not confiscate their properties.\textsuperscript{82} It has been narrated that:

\begin{quote}
The Prophet (peace be upon him) asked Abdullah bin Masud: O Ibn Umm Abd: Do you know what is Allah’s command concerning the rebels of this Ummah? … The Prophet (peace be upon him) said: Their wounded ones will not be laid hands on and their captives will not be killed, and the one who flees, will not be pursued, and their properties will not be distributed as spoils.\textsuperscript{83}
\end{quote}

Indeed, this interpretation of the Quran offers the potential to promote an alternative mode of dealing with detained suspected IS affiliates. Though it certainly still exists as an underground organization, IS has arguably lost its central organization in Iraq. Respectively, based on Islamic jurisprudence, the argument could be made that there is no requirement to execute repenting \textit{bughat}.

The Quran, in other words, prescribes government to try to reconcile with \textit{bughat} before, during and even after the fight. In line with this interpretation, Islamic scholars argue that acceptance of repentance may be a fruitful pathway to establishing peace.\textsuperscript{84} What’s more: some interpretations of Islamic jurisprudence state that \textit{bughat} may even repent at \textit{any moment in time} to have their punishment waived; either before or after apprehension.\textsuperscript{85} According to Ibn Qudamah, one of the most notable Sunni Muslim ascetics and a jurisconsult, the logic behind this leniency is similar to the leniency adopted for repenting \textit{muharibin}: if \textit{bughat} see there is no point to turning back or ‘feel drowned,’ they will not lay down their arms.\textsuperscript{86}

\textsuperscript{78} Ab Ja’far M.I.H Tusi, \textit{Al- Mabsut fi Fiqh al-Imamia} (Tehran: Maktaba al-mortazaviyah, 2008) [in Arabic]; al-Hilli, supra n 13.
\textsuperscript{79} Abdullah al-Tayyar, supra n 72.
\textsuperscript{80} Oudah, supra n 63. Arguably, the aforementioned Islamic regulation can be considered as equivalent to Common Article 3 of the 1949 Geneva Conventions.
\textsuperscript{81} al-Juba’i al’Amili, supra n 14. Again, it should be stressed that the jurists mean the penalty for Baghy can be waived. They may still be held accountable for crimes against individuals during the conflict.
\textsuperscript{82} Ghazi Abu Yusuf, \textit{Kitab Alkharaj} (Beirut: Dar Elmarefah, 1978) [in Arabic]. It goes beyond the framework of this article, but there have been some other incidents in early Islam – such as the Ridda Wars, the Siege of Uthman (the third caliph) and the Battle of Nahrawan – which are also relevant in this regard.
\textsuperscript{83} Mawdudi et al., supra n 15 at point 17.
\textsuperscript{84} Naser Makarem Shirazi, \textit{Tafsir Nemooneh} (Qom: Dar Al-Kotob Islamiyah, 1995) [in Persian]; Abu Ali Fadhl ibn Hasan Tabresi, \textit{Majma’ al-Bayan fi-Tafsir al-Qur’an} (Tehran: Naser Khosro, 1993) [in Arabic].
\textsuperscript{85} Amini and Taheri, supra n 60.
\textsuperscript{86} Ibn Qudamah, supra n 12.
Assessment of Repentance in Baghy and Hirāba

In light of the above, it is important to further explore the meaning of repentance and the ways in which it can be established. Is Tawba merely considered to be an expression of remorse, or should it be accompanied by some other elements and conditions? Since repentance by its very nature concerns an inner feeling, how is it possible for third actors to assess if someone is genuinely remorseful? International criminal tribunals and frontline professionals trying to disengage extremists struggle with these very same questions.⁸⁷ Repentance and disengagement are inner transformations with often temporary manifestations which do not necessarily guarantee credibility or sincerity. Islamic jurists acknowledge the complexities related to the concept and assessment of repentance and have extensively discussed these issues.

In defining repentance (Tawba), Islamic jurists consensually consider it to be a process with multi-level stages which include both inner elements and a public reflection on the repented behavior.⁸⁸ An acceptable repentance includes three elements: 1) a sincere feeling of remorse and deep regret; 2) a firm intention to shun the wrong and not persist in it; and 3) steadfastness in following the right way (e.g., by trying to compensate for the harm caused).⁸⁹

Acknowledging that there is no concrete way to be sure that someone genuinely repents, Islamic jurists have tried to present some ways to accept or reject repentance. In line with the above, some jurists have stated that the proof of sincere repentance is the voluntarily offering of oneself for arrest.⁹⁰ By contrast, others state that repentance cannot be accepted immediately and are of the opinion that there should be a reasonable period of time between fighting and repenting as a test.⁹¹ While some suggest that a one-year gap would be enough, others have not mentioned a particular timeframe but reason that it should be long enough for a judge to be assured that there is a low chance of recidivism.⁹² Imam Malik Ibn Anas, founder of one of the four schools of Sunni Islamic law, stressed the importance of ex-rebels or -fighters expressing their feelings of remorse in court as well as publicly showing their repentance.⁹³ Other Islamic scholars, however, state that expressing repentance in court is the only mandatory requirement for an acceptable repentance.⁹⁴ Finally, a considerable number of Islamic scholars argue that a case by case approach should be taken.⁹⁵

⁸⁷ Barbora Hola, Joris van Wijk, Francesca Constantini, and Armi Korhonnen, ‘Does Remorse Count? ICTY Convict’s Reflections on Their Crimes in Early Release Decisions,’ International Criminal Justice Review 28(4) (2018): 349–371.
⁸⁸ Amini and Taheri, supra n 60.
⁸⁹ Husain, supra n 56; Taheri, supra n 59. These elements are reflected in the Quran as well (Quran 3:135 and 25:70).
⁹⁰ A.B.J. Al-Jaza’iri, Minhaj Al-Muslim (Cairo: Dar Ehya al Kotob al Arabia, 1976) [in Arabic].
⁹¹ Abu ’Ishaq al-Shirāzī, Al-Mohazab (Beirut: Dar Elmarefah, 2003).
⁹² Amini and Taheri, supra n 60; Ibid.
⁹³ Ahmad Fathi Bahnassi, almousoua’ih aljna’a’ah fi al-fiqh al-Islami (Beirut: Dar Al Nahda Al Arabiya, 1992) [in Arabic].
⁹⁴ Amini and Taheri, supra n 60.
⁹⁵ Ibid.
Accessories of *Hirāba* and *Baghý*

We have already discussed above that Iraqi judges treat direct and indirect perpetrators or accessories of terrorism the same as each other. In contrast, Islamic jurisprudence takes a more lenient approach towards accessories of *muharibin* and *bughat*, particularly wives and children, who have not directly engaged in violent operations. 96 Both Sunni and Shia jurists argue that the family members of *bughat* should not be captured and their properties cannot be seized by the government. 97 Muhammad ibn Idrīs al-Shāfiʿī, the founder and leader of the Shafīʿi school of law, argues that the women and children of *bughat* are not allowed to be imprisoned. 98 The other Sunni school of law, the Maliki school, applies the same rule and states that there should be no punishment for them. 99 Hussein-Ali Montazeri, an Iranian Shia theologian who was a former designated successor to the revolution’s Supreme Leader in 1979, argues that ‘the Islamic prohibition of capturing the wives and children of *bughat* is one the irrefutable principles of Islamic jurisprudence.’ 100 He has the same idea about the women who have not committed murder during *Hirāba*:

In case of *Hirāba*, some jurists have said that a female muharib should not be executed . . . do not execute these women [the abovementioned Iranian prisoners in 1979 who were recognized as Muhrīb] . . . they are misled . . . [instead of execution] send them to prison for a while, they can be released after identifying their mistakes. 101

**ISLAMIC LAW AND THE POTENTIAL TO BALANCE JUSTICE AND PEACE IN IRAQ’S POST-IS PERIOD**

If the abovementioned interpretations of Islamic law were integrated into Iraq’s transitional justice framework, this could – in principle – affect thousands of currently detained IS affiliates:

1. The argument could be made that the majority of arrested IS fighters had the intention to challenge the legitimacy of the state/leader and therefore fall into the category of *bughat*. Various reports explain that many Iraqis joined IS due to poverty, marginalization, feelings of injustice or to compete with Shia in what they regarded to be a zero-sum game for gaining political power. 102 This substantiates possible claims that they had the abovementioned intention.

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96 Ibn Muflih al-Maqdisi, supra n 76.
97 Muhammad Hasan al-Najafi, *Jawahir al-Iklil Sharh Mukhtasar al-ʿAllamat al-Shaykh Khalil* (Beirut: al-Maktabah al-ʿAsriyah, 2000) [in Arabic].
98 Muhammad ibn Idrīs al-Shāfiʿī, *al-Maqdisi*, supra n 76.
99 Salih Abd al-Sami al-Abi Azhari, *Jawahir al-Iklil Sharh Mukhtasar al-ʿAllamat al-Shaykh Khalil* (Beirut: al-Maktabah al-ʿAsriyah, 2000) [in Arabic].
100 Hussein-Ali Montazeri, *Mabani feqhi hokoumat-e- Islami* (Qom: Keyhan, 1989), 536 [in Arabic].
101 Montazeri, supra n 72.
102 Fred Strasser, ‘Iraq Research: Sense of Injustice Is Key to Violent Extremism Poor Governance Feeds Armed Groups, Mercy Corps Says,’ United States Institute of Peace (USIP), 13 January 2016.
2. It can subsequently be argued that IS’s central organization has been destroyed, that the group is no longer powerful enough to challenge the state and that the main interest of the Iraqi state is now to re-establish public harmony.

3. There are numerous indirect perpetrators and IS affiliates (in particular family members of fighters) who have voluntarily surrendered and/or have in the meantime publicly expressed remorse.103

4. According to Islamic law, under certain conditions, repentance of these *bughat* before, during and even after capture may lead to waiving of or more lenient punishment.

5. Family members of IS affiliates who cannot be considered direct perpetrators of *baghy* should not be captured and their properties cannot be seized by the government.

6. Alternatively, the argument could be made that most or some IS members fall into the category of *Hirāba*.

7. In principle, according to Islamic law, a judge is then limited to choosing one of four penalties: execution, amputation, crucifixion or exile.

8. However, as discussed above, for those *muharibin* who have repented before apprehension it is also possible not to apply these severe punishments.

Following the above, the Iraqi justice system can find inspiration in Islamic law to avoid excessive prosecution of IS affiliates. Based on the very principles of Islamic law, and therefore in line with the Iraqi constitution, the Iraqi government might – next to prosecuting and severely punishing direct perpetrators of international crimes or terrorism – develop alternative less- or non-retributive modes of accountability for IS affiliates, accessories and their family members who have not been directly engaged in committing crimes. This has the potential to strike a better balance between achieving justice for victims and long-term peace and security.

At the same time we should not be naïve. We are very well aware that from a practical perspective, it is questionable to what extent there is a willingness amongst Iraqi politicians, its religious leaders and the Iraqi people to explore these possibilities. Many challenges lie ahead.

Firstly, although we tried to use both Shia and Sunni authentic sources and relied mostly on consensual approaches/opinions which have already been accepted by both sides, we have to acknowledge that there is no absolute consensus about the presented interpretations of Islamic jurisprudence, neither between different sects (Shia and Sunni) nor among scholars and jurists of the particular branches of *Fiqh* (jurisprudence). The presented interpretations will therefore by no means be simply accepted by everyone, particularly when it comes to identifying the wrongful acts as *Baghy* or *Hirāba*.

103 Lindsey Snell, ‘Exclusive: Filmed Behind Bars ISIS Fighter Mohamed Amrouni Expresses “Deep Regret”,’ *The Investigative Journal (TIJ)*, 7 July 2019; CBS News, ‘Growing Number of ISIS Fighters Regret Joining Terror Group,’ 12 March 2017, https://www.cbsnews.com/video/growing-number-of-isis-fighters-regret-joining-terror-group/ (accessed 19 September 2020).
Regardless of these precedential and academic differences in interpretation—which might eventually be solved—there are many other potential barriers that may block any changes in Iraq’s current transitional justice approach. The Iraqi people’s popular perception of the issue is arguably one of the most important elements. Sectarian and tribal identities and perceptions often overshadow other social, cultural or even political factors in Iraq.\(^{104}\) The fueled sectarian tensions following the IS insurgency make the whole issue of taking a less retributive approach even more complicated. In line with this sectarian narrative in the postconflict era there is a predominant misconception among Shiites that they were the main victims of IS. Similarly, there is a misconception that Shiites were the main group which defeated IS and released Sunni civilians from the brutality of IS.\(^ {105}\) For this reason, any steps to treat IS affiliates more leniently will most likely lead to protests by Shia in particular and also by severely victimized Yazidis. According to a survey discussed by Ali Al Tuma, in five Shia-majority provinces\(^ {106}\) (with a sample size of 1,146 people), 77 percent of (Shia) respondents were of the opinion that mere membership of IS should lead to severe punishment. Furthermore, 54 percent of the respondents believed IS trials not to be hasty or random.\(^ {107}\) Christia, Dekeyser and Knox interviewed 2,410 Iraqi Shia pilgrims. Their respondents voiced overall critique of summary executions but did support the installment of a tribunal to hold IS affiliates accountable, no matter if the victims were Sunni or Shia.\(^ {108}\) Although diverse surveys show that Iraqis are deeply divided on how to punish detained suspected IS affiliates, it seems that the aforementioned result is not limited to Shia groups. Also in some heavily affected Sunni regions, public perceptions support the retributive approaches currently taken. Mironova, Whitt and Assi conducted a survey of 400 civilians in Mosul, where mainstream Sunni Islam is the largest religion, many of whom had been victimized by IS. The survey revealed that nearly 90 percent of Mosul civilians would support the execution of Iraqi IS fighters and 40 percent stated that if a civilian establishes justice by themselves and kills an IS fighter in the street, they should not be punished at all.\(^ {109}\)

That said, it is important to stress that Ali Al Tuma’s research shows that although the Shia population generally supports the currently taken punitive policy and judicial measures, they, in contrast to the Iraqi courts and laws, believe in different levels of culpability and differentiation between various degrees of criminal

\(^{104}\) Khalil Osman, *Sectarianism in Iraq: The Making of State and Nation Since 1920* (London: Routledge, 2014); Mari Luomi, ‘Sectarian Identities or Geopolitics: The Regional Shia-Sunni Divide in the Middle East’ (Helsinki: Finnish Institute for International Affairs, 2008).

\(^{105}\) Florence Gaub, ‘Meet Iraq’s Sunni Arabs, A Strategic Profile,’ *European Union Institute for Security Studies (EUISS)*, 4 October 2017.

\(^{106}\) Baghdad, Karbala, Najaf, Babil and Qadisiyya.

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\(^{109}\) Vera Mironova, Sam Whitt and Dara Tahseen Assi, ‘Iraq Confronts Its Own Prisoner’s Dilemma,’ *Foreign Policy*, 12 October 2019. One of the aforementioned interviewees who was a victim of IS said: ‘ISIS killed so many people that executing their members is the only right way to punish them’ (Ibid., para. 7).
responsibility. According to a survey by Kao and Redlich Revkin, Iraqis’ preferences for diverse judicial mechanisms (punishment, forgiveness and reintegration) highly correlate with the level of collaboration. While 78 percent of respondents in Mosul thought capital punishment would be an appropriate penalty for IS fighters, only 31 percent were supportive of the same penalty for women married to IS fighters and 15 percent for a janitor affiliated to IS. The available surveys in other words demonstrate that the general population tends to differentiate layers of blameworthiness. Al Tuma claims that the general population, including Shias, are therefore open to alternative and more lenient judicial policies and measures.

Moreover, some religious leaders have also made efforts to moderate the adopted measures in dealing with IS detainees. Ayatollah Ali al-Sistani, the highest-ranking Shia religious authority in Iraq, for instance stressed that no retaliation should take place and that IS detainees and their contributors should not be mistreated or tortured. In reaction to a short video in which Iraqi soldiers were beating IS detainees, he emphasized that ‘According to the law and Shari’a, it [mis-treatment of them] is a serious crime and they must be handed over to a fair judiciary system.’

CONCLUSION

Within the framework of Islamic law, any crimes which jeopardize the security and stability of the state like rebellion (Baghy) and unlawful warfare (Hirāba) are considered very severe crimes which, in principle, need to be responded to harshly. However, a careful review of Islamic jurisprudence shows that there are also alternative interpretations of Islamic jurisprudence which would allow for a more forward-looking accountability framework with the potential to strike a better balance between achieving justice for victims and long-term peace and security. In Islamic law, ending a rebellion/conflict peacefully, re-establishing public harmony and preventing further bloodshed is the first and foremost priority of the state which can overrule the importance of punishing the perpetrators.

In light of this overruling principle, repentance, accompanied by a set of conditions, can cause certain punishments to be changed or even waived, notably the penalties for rebellion and unlawful warfare. In the case of rebellion (Baghy), if the military group is already disbanded and has lost its central organizations, Islamic law recommends reconsideration of punishment. In contrast to the currently taken prosecutorial approach in Iraq, in order to prevent a new cycle of violence Islamic jurisprudence proposes a more lenient approach towards accessories, particularly wives

110 Al Tuma, supra n 1.
111 Kristen Kao and Mara Redlich Revkin, ‘To Punish or to Pardon? Reintegrating Rebel Collaborators After Conflict in Iraq,’ The Program on Governance and Local Development, Working Paper No. 17, University of Gothenburg, 2018.
112 Al Tuma, supra n 1 at 3–4.
113 Jamaran, ‘Ayatollah Sistani: Torture of IS-Detainees is a Crime in Law and Shari’a,’ 21 July 2017, https://www.jamaran.news/fa/tiny/news-705444 (accessed 19 September 2020) [in Persian].
114 Ibid., para. 2.
and children, who have not directly engaged in violent operations and terrorist attacks.

Given the above, Islamic law can be inspirational for developing alternative non-retributive modes of accountability, which are more in line with principles of humanitarian law than the approaches currently taken in Iraq. As such, it has the potential to strike a better balance between achieving justice for victims and long-term peace and security in general. In particular, this locally inspired narrative of postconflict justice which has been contrived from Islamic resources might arguably have a higher chance of being accepted and supported by religious non-state actors in Iraq. Nevertheless, integrating these interpretations of Islamic law into Iraq’s existing transitional justice framework is certainly not without challenges. The popular perception of the Iraqi people is arguably one of the most important barriers that could block any of the suggested changes to Iraq’s current transitional justice approach.