

# AL-SARAKHSĪ'S CONTRIBUTION TO THE ISLAMIC LAW OF WAR

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## ABSTRACT

*This paper examines the contributions of the Ḥanafī jurist al-Sarakhsī (d. 483 AH/1090-91 CE) to the development of the Islamic tradition of war. By examining al-Sarakhsī's treatment of the use of force by both state and non-state actors in al-Mabsūṭ, this paper answers important questions about warfare in Islam. First, it asks whether Islam sanctions offensive war against non-Muslims because of their religious beliefs. Second, it investigates the extent to which Islamic *jus in bello* rules are consistent with the four Geneva Conventions of 1949 and their Additional Protocols. Third, it examines the circumstances under which it is permissible for Muslims to rebel against their ruler. Fourth, it explores the meaning of terrorism according to Islamic law and whether or not terrorism is punishable under Islamic law. This paper shows that the Islamic law of war has the potential to impact the attainment of peace in our globalized world. More importantly, this paper exposes the need for a reevaluation of specific classical Islamic rules regulating warfare in light of present-day armed conflicts.*

*Keywords: Islamic law of war, Jihad, al-Sarakhsī, Rebellion, Terrorism*

## 1. INTRODUCTION

This paper examines the contributions of the Ḥanafī jurist al-Sarakhsī (d. 483 AH/1090-91 CE) to the development of the Islamic conceptions of (1) *jus ad bellum* (the principles concerning the permissibility of the decision to wage war) and (2) *jus in bello* (the rules regulating warfare) in both international and domestic armed conflicts. By examining al-Sarakhsī's treatment of the use of force by both state and non-state actors in his monumental work *al-Mabsūṭ*, this paper answers important questions concerning Islamic justifications for waging war and Islamic rules regulating warfare. First, it asks whether Islam sanctions offensive war against non-Muslims because of their religious beliefs. Second, it investigates the extent to which Islamic *jus in bello* rules are consistent with the four Geneva Conventions of 1949 and their Additional Protocols? Third, examines the circumstances under which it is permissible for Muslims to rebel against their ruler? Fourth, it explores the meaning of terrorism according to Islamic law and whether or not terrorism is punishable under Islamic law.

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This paper compares al-Sarakhsī's interpretations with those of other prominent Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī jurists regarding the Islamic law of war. Al-Sarakhsī's answers to the questions posed above may provide some insight into the potential impact the law of war of one of the world's most influential legal systems may have on the peace of our globalized world. This paper argues that certain rules developed by al-Sarakhsī regulating the wartime conduct of Muslim armies ought to be reevaluated by Muslim jurists today in light of present armed conflict in both international and domestic contexts.

## 2. INTERNATIONAL WAR

Classical Muslim jurists did not explicitly classify war as either "international" or "domestic." Rather, they discussed the Islamic law of war in different chapters such as *jihād* and *siyar*. The Ḥanafī jurists, including al-Sarakhsī, addressed the subject under the chapter of *siyar*. The word *siyar* (singular *sīrah*), as explained by al-Sarakhsī, refers, on the one hand, to the ways in which Muslims ought to interact with non-Muslims of *dār al-ḥarb* ("the abode of war," denoting lands outside the territory of Muslim governance), including those with whom Muslims entered into peace treaties and those with whom no such treaties were consummated. In this context, *siyar* provides an explication of Islamic international law because of its discussion of the treatment of foreign citizens during times of peace and war. On the other hand, *siyar* also refers to the laws governing the treatment of *ahl al-dhimmah* (permanent non-Muslim citizens of the Islamic state), *al-murtadīn* ("apostates") and *ahl al-baghy* ("rebels" or "secessionists"). Thus, *siyar* also provides an explication of Islamic law regarding domestic conflicts.

Classical Muslim jurists discussed diverse issues regulating the interaction of Muslims with the territories and various peoples of *dār al-ḥarb* in times of peace and war. Indeed, al-Sarakhsī discussed several issues under the title *siyar*: Islamic international humanitarian law, looting, *jizyah* (tax levied on *ahl al-dhimmah* to exempt eligible males from conscription), peace treaties with the leaders of *dār al-ḥarb*, marriage and trade between Muslims and *dār al-ḥarb*, and the treatment of apostates and rebels against the state.

### 2.1 ISLAMIC JUSTIFICATIONS FOR WAR

Examining the Islamic justifications for war is crucial to understanding the Islamic law of war (*jihād*), which is one of the most misunderstood Islamic concepts by the West. However, classical Muslim jurists did not, as noted by many modern jurists,<sup>1</sup> pay adequate attention to this issue. Ibn Taymiyyah (d. 728 AH/1328 CE) was the first Muslim jurist to write a treatise dedicated solely to this issue. This work was republished in 2004 under the title *A Concise Rule for Fighting Against Nonbelievers*

1. See, e.g., Khaled Abou El Fadl, *The Rules of Killing at War: An Inquiry into Classical Sources*, 89 THE MUSLIM WORLD 150 (1999); Sohail H. Hashmi, *Saving and Taking Life in War: Three Modern Muslim Views*, 89 THE MUSLIM WORLD 158 (1999).

and Making a Truce with Them and the Prohibition On Killing Them Solely Because of Their Nonbelief.<sup>2</sup>

In fact, classical Muslim jurists' systematic approach to the discussion of the subject, including al-Sarakhsī's, further complicates the competing Islamic justifications for war against non-Muslims. Al-Sarakhsī begins by stating, Muslims "have to call polytheists to the religion [of Islam] and to fight against those who reject it."<sup>3</sup> He adds it is well-established that *jihād* against polytheists is obligatory until the Day of Judgement. Al-Sarakhsī, like all Muslim jurists, explains that *jihād* takes two forms: (1) *jihād o al-daf*: defensive war, namely, when foreign forces invade Muslim territories, which he describes as a personal duty of every capable Muslim (*farḍ al-'ayn*); and (2) *jihād al-talab*: referring to those military campaigns waged by the Islamic state to spread the message of Islam in non-Muslim territories, which he describes as a collective duty of all Muslims (*farḍ al-kifayah*). War must be waged as such if non-Muslims in Muslim territories refuse to either accept the religion of Islam or pay *jizyah*.

This paper's focus is *jihād al-talab*, which can be described as militarized missionary campaigns. Pursuant to the rules contained in Islamic legal treatises, non-Muslims are offered two options: either accept Islam or pay *jizyah* to the Islamic state. If they refuse, Muslims are then permitted to use of force. Why, then, is it permissible for Muslims to initiate war against non-Muslims simply for refusing to accept Islam or pay *jizyah*. Put differently, are Muslims required to wage war against non-Muslims accordingly?

Classical Muslim jurists disagree over this question and propose two different answers. According to the majority, including Ḥanafī, Mālikī and Ḥanbalī jurists, the primary Islamic justification for war is defense against another's aggression. Aggression as such includes aggression against the obligation of Muslims to preach Islam in non-Muslim territories. Shaykh Yūsuf al-Qaraḍāwī notes Islamic states resorted to this kind of *jihād* because non-Muslim regimes did not grant such states the liberty to preach Islam to their inhabitants.<sup>4</sup> At present, however, this justification collapses. The internet and other indicia of globalization enable Muslims to freely preach Islam to the inhabitants of nearly any part of the world. According to a minority of jurists, including al-Shāfi'ī (d. 204 AH/820 CE), Ibn Ḥazm (d. 456 AH/1064 CE) of the now extinct Zāhirī school, and a small number of Ḥanbalī jurists, the Islamic justification for war is the enemy's disbelief itself. However, this minority agrees that Muslims may resort to fighting against their enemies only after rejecting both Islam and payment of *jizyah*.

The conflicting justifications for going to war against non-Muslims is closely linked to proselytization. This interrelatedness stems from the notion that Muslims

2. TAQĪ AD-DĪN AHMAD IBN TAYMIYYAH, QĀ'IDAH MUKHTASARAH FĪ QITĀL AL-KUFFĀR WA MUHĀDANATHIM WA TAHRĪM QATLIHIM LI-MUJARRAD KUFRIHIM 1424 ('Abd al-'Azīz ibn 'Abd Allah ibn Ibrāhīm al-Zayd Āl Hamad ed., 2004).

3. MUHAMMAD IBN AHMAD IBN ABĪ SAHL AL-SARAKHSĪ, KITĀB AL-MABSŪT 1197 [hereinafter AL-SARAKHSĪ] (Hassān 'Abd al-Mannān ed., 2010).

4. YŪSUF AL-QARADĀWĪ, FIQH AL-JIHĀD 54 (2009).

are required to spread Islam to non-Muslims. Islamic states have thus resorted to militarized missionary campaigns to satisfy this requirement. The obligation to preach Islam has led some to conclude that Muslims fight against those they consider to be non-believers because of the latter's nonbelief. This understanding, however, fails to consider why Muslims would permit *jizyah* as an alternative to conversion. Al-Sarakhsī noted that increasing the state's coffers was not the aim of imposing *jizyah* on non-Muslims. Once non-Muslim populations rejected the call to Islam and accepted the condition of paying *jizyah*, any Islamic justification for war vanished. Moreover, as al-Sarakhsī wrote, "although *kufṛ* [unbelief in God] is one of the greatest sins, it is between the individual and his God the Almighty and the punishment for this sin is to be postponed to the *dār al-jazā'* ('the abode of recompense' or the Hereafter)."<sup>5</sup> Therefore, and in response to the first question raised at this paper's outset, deciphering the classical Muslim jurists' justifications for war in the post-United Nations world, it may be concluded that the only Islamic justifications for war are defending against anti-Muslim aggression in Muslim territories and anti-Muslim persecution within the territories of *dar al-ḥarb*. This conclusion can be reinforced in the following examination of the Islamic *jus in bello* norms.

## 2.2 ISLAMIC INTERNATIONAL HUMANITARIAN LAW

Al-Sarakhsī, like the rest of the Muslim jurists, treats in great detail the Islamic rules regulating warfare, or *jus in bello*. Such rules of conduct are not necessarily restricted merely to acts of warfare, but also extend to all conduct during the times of war and, moreover, to those time periods during which no peace treaty exists. Al-Sarakhsī's main concern here is to balance the tensions presented by the need for Muslims to adhere to Qur'ānic principles and the tradition of the Prophet on the one hand, and to win the war on the other. In abiding by the Islamic laws of war, Muslims must first follow the dictates of their faith in guiding their conduct and second attempt to achieve victory. The discussion here will focus on issues of contemporary relevance, such as the protection of civilians, the permissibility of attacking the enemy by night, human shields, prisoners of war, and peace treaties with enemies.

### 2.2.1 PROTECTION OF CIVILIANS

Based on a *ḥadīth* of the Prophet, al-Sarakhsī argues Islam prohibits targeting children, women and the elderly in the conduct of warfare. He points out that these categories of civilians are not to be targeted because they do not engage in combat. However, if an elderly individual helps in planning the war, then it is permissible to target them.<sup>6</sup> Al-Sarakhsī mentions only these three categories as having non-combatant immunity despite the fact that other *aḥadith* add members of the clergy and hired laborers (*al-'usafā'*) to the list of those who cannot be targeted in warfare. Within the discourse among Islamic jurists regarding the justifications for war, or *jus*

5. *Id.* at 1258.

6. *Id.* at 1199, 1211.

*ad bellum*, jurists who believe that Islam justifies war in defense of aggression and hostility extend the list of those who have non-combatant immunity to include those living with physical or mental disabilities, farmers, craftsmen and traders. Still, all jurists agree that if any of these categories of citizens engages in combat, they are absolved of their categorical non-combatant immunity. However, a minority of jurists argue that, apart from women, children, and clergy, anyone who rejects Islam or the payment of *jizyah* can be targeted during war.

This means, according to the majority's position, fighting is permissible against enemy combatants only. Thus, James Turner Johnson concludes, "[t]he [Islamic] position is clear: there is no justification for warfare directed intentionally against noncombatants in *jihād*."<sup>7</sup> Yet the doctrine of non-combatant immunity developed by classical Muslim jurists seems to be based entirely upon the Prophet's explicit commands as recorded in his *aḥādīth*, and does not stem from the jurists' ethical concerns regarding the protection of the lives of innocent civilians.

### 2.2.2 NIGHT ATTACKS AND HUMAN SHIELDS

*Al-bayāt* (attacking the enemy by night) is one of the issues discussed by almost all of the jurists. In classical Islamic times, attacking the enemy by night in war situations largely entailed Muslim armies throwing stones or fire towards the enemy because the difficulty of observing the enemy at nighttime would prevent the two armies from engaging in face-to-face combat. The main problem here is that such indiscriminate use of arms endangered the lives of innocent civilians. Nonetheless, without extensive elaboration, al-Sarakhsī says that he does not object to attacking the enemy by night. Although most of the jurists also permit *al-bayāt*,<sup>8</sup> others note that it is disfavored.<sup>9</sup> Al-Sarakhsī also permits the use of other weapons that may increase the risk of collateral damage such as throwing stones at, burning, or flooding enemy fortifications.<sup>10</sup> Another commonly discussed concept *al-tatarrus* refers to the use of human shields. To protect themselves from the Muslims' attacks, opposing forces often used their own civilians, mainly women and children or, in some cases, Muslim or *dhimmi* captives, as human shields. The majority of jurists permit attacking the human shield in both cases out of military necessity, but under the condition that the Muslim army aims to direct its attack at the enemy combatants and seeks to avoid injuring the human shield.<sup>11</sup>

7. JAMES TURNER JOHNSON, *MORALITY AND CONTEMPORARY WARFARE* 186 (1999); See also JOHN L. ESPPOSITO, *UNHOLY WAR: TERROR IN THE NAME OF ISLAM* 32 (2002); Muhammad Munir, *Suicide Attacks and Islamic Law*, 90 INT'L REV. OF THE RED CROSS 71, 84-86 (2008).

8. MUHAMMAD IBN IDRĪS AL-SHĀFI'Ī, *AL-UMM* 252 (2d ed. 1973); MUWAFFAQ AL-DĪN 'ABD ALLAH IBN AHMAD IBN QUDĀMAH, *AL-MUGHNĪ* 230 (1985); AHMAD IBN SA'ĪD IBN HAZM, *AL-MUHALLĀ* 296 (n.d.).

9. MUHAMMAD IBN 'ISĀ AL-TIRMIDHĪ, *AL-JĀMI'* AL-SAHĪH SUNAN AL-TIRMIDHĪ 121 [hereinafter *IBN QUDĀMAH*] (Ahmad Muhammad Shākir et al. eds., n.d.).

10. AL-SARAKHSĪ, *supra* note 3, at 1212, 1231.

11. *Id.* at 1232. See also, e.g., MUHAMMAD IBN JARĪR AL-TABARĪ, *KITĀB AL-JIHĀD WA KITĀB AL-JIZYAH WA AHKĀM AL-MUHĀRIBĪN MIN KITĀB IKHTILĀF AL-FUQAḤĀ'ULI-ABĪ JA'FAR MUHAMMAD IBN JARĪR AL-TABARĪ* 5-7 (Joseph Schacht ed., 1933); MUHYĪ AL-DĪN IBN SHARAF AL-NAWAWĪ, *AL-MAJMO' SHARH AL-MUHADHDHAB* 59 (Mahmūd Matrajī ed., 2000); MUHAMMAD IBN HABĪB AL-MĀWARDĪ, *AL-AHKĀM*

Al-Sarakhsī and many other classical Muslim jurists issued certain rulings that may lead to the indiscriminate killing of non-combatants and even, in certain cases, Muslim or *dhimmi* captives. Although these rulings were made in sociopolitical contexts quite different from today's, some contemporary Muslim terrorist groups have resorted to such rulings (particularly *bayāt* and *tatarrus*) in an effort to justify their indiscriminate killings of innocent Muslim and non-Muslim civilians in Iraq and other war-torn areas.

### 2.2.3 PRISONERS OF WAR

Al-Sarakhsī was of the opinion that prisoners of war (POWs) cannot be exchanged for money or graciously set free unless it serves the public interest of Muslims, contrary to al-Shāfi'ī's opinion. Al-Sarakhsī acknowledges that the Prophet freed some of the Quraysh POWs at the Battle of Badr in exchange for money, but he insists that this was later abrogated by verse sixty-seven of *Sūrat al-Anfal*. Thus, al-Sarakhsī concludes that a POW is to be executed unless he accepts Islam. This position, however, contradicts the Ḥanafī position that nonbelief in itself is not a justification for war.

According to a group of the earliest Muslim jurists, including Ibn 'Abbās (d. 68 AH/668 CE), 'Abd Allah ibn 'Umar (d. 73 AH/693 CE), al-Ḥasan al-Baṣrī (d. 110 AH/728 CE), and Sa'īd ibn Jubayr (d. 95 AH/714 CE), based on the Qur'ānic injunction in verse four of *Sūrat Muḥammad*, POWs are to be released freely or in exchange for ransom.<sup>12</sup> Moreover, the majority of jurists give the ruler the freedom to choose whether POWs are to be released freely or for ransom, executed, or enslaved, depending on which course of action better serves the interests of the Muslim state.

The treatment of POWs in Islam yields two conclusions. First, al-Sarakhsī advocates for the public interest above a Qur'ānic-based approach.<sup>13</sup> Second, al-Sarakhsī's ruling permitting the execution of POWs may be used by terrorist groups as a justification for executing non-Muslim captives.

### 2.2.4 PEACE AGREEMENTS

Al-Sarakhsī addressed two types of agreements with foreign entities: first, peace treaties between the rulers of Islamic and foreign states (international treaties); second, the *amān* (literally "protection" or "safety") system which refers to both safe quarter and safe conduct contracts. Quartering refers to providing enemy belligerents with shelter during wartime, while the safe conduct contracts refer to the protection

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AL-SULTĀNIYYAH WA AL-WILĀYĀT AL-DĪNIYYAH 57 (Ahmad Mubārak al-Baghdādī ed., 1989); NAJIB AL-ARMANĀZĪ, AL-SHAR AL-DAWLĪ FĪ AL-ISLĀM 124 (2d ed. 1990).

12. See, e.g., MUHAMMAD IBN 'ALĪ IBN MUHAMMAD AL-SHAWKĀNĪ, FATH AL-QADĪR 33 (n.d.); SOBHI MAHMASSANI, AL-QĀNŪN WA AL-'ALĀQĀT AL-DAWLIYYAH FĪ AL-ISLĀM 257 (1972); WAHBAH AL-ZUHAYLĪ, ĀTHĀR AL-HARB FĪ AL-FIQH AL-ISLĀM 439 (3d ed. 1998); IHSĀN AL-HINDĪ, AHKĀM AL-HARB WA AL-SALĀM FĪ DAWLAH AL-ISLĀM 209 (1993); Lena Salaymeh, *Early Islamic Legal-Historical Precedents: Prisoners of War*, 26 LAW AND HIST. REV. 528 (2008).
13. AL-SARAKHSĪ, *supra* note 3, at 1209.

granted to any non-Muslim citizen of an enemy state who desires to enter the Islamic state for a temporary stay in order to pursue certain activities such as business or education. Any Muslim individual can quarter and enter into safe conduct contracts, which facilitates the protection of the person and property. Thus, this practice of quartering, as explained by classical Muslim jurists, parallels in certain respects the *hors de combat* status, as defined in Article 41 of the Additional Protocol I of the Geneva Conventions. The safe conduct contract is similar to the modern visa system implemented by states today.

Al-Sarakhsī conceived of three cases under which an Islamic state might enter into a peace treaty with an enemy state or *ahl al-harb*. The first case arises when the enemy seeks a truce for some years *bi-ghayr shay'* (literally "in return for nothing"), under which the enemy will not pay the *jizyah*. The Islamic state may accept this agreement accordingly only if it serves the public interest of Muslims.<sup>14</sup>

The second case arises when opposing forces besiege a Muslim state and demand that the Islamic state pay in exchange for a truce. Here, the Islamic state is not permitted to accept this agreement unless there is a dire necessity to do so (for instance, if the enemy threatens to violently attack the Muslims). In other words, the head of the Islamic state must find that accepting such a truce serves the Muslim's is necessary for their continued existence. This ruling is based on the Prophet's initial agreement to pay half of Medina's produce to 'Uyaynah ibn Ḥiṣn in return for his retreat from the Battle of the Ditch (5 AH/627 CE). This proposed treaty, however, was not enforced because a number of the Companions of the Prophet convinced him not to enter into such an agreement. Still, al-Sarakhsī gives legal significance to the Prophet's rationale for initially accepting such a treaty because it was based on his desire to save the Muslims from harm at the hands of their enemies.<sup>15</sup>

The third case arises when an enemy state asks for a truce for a certain number of years and agrees to pay *khāraj* (land tax) to the Islamic state under the condition that Islamic law will not be imposed. Again, as with the other two cases, the Muslim state is not permitted to accept this agreement unless it serves the Muslims' best interests.<sup>16</sup>

Al-Sarakhsī's rulings in all three cases are based on the principle of public interest. In 1979 the then Grand Mufti of Egypt and later Grand Shaykh of Al-Azhar, Shaykh Jād al-Ḥaqq 'Alī Jād al-Ḥaqq (d. 1996 CE), based his *fatwā* permitting the peace agreement between Egypt and Israel upon the same principle. He explained that this peace agreement was permissible under Islam because it furthered the public interest by liberating a large part of Egyptian land illegally occupied by Israel. Moreover, Shaykh 'Alī Jād al-Ḥaqq permitted such an agreement with the hope that it would restore Jerusalem and the rest of the illegally occupied Palestinian territories.<sup>17</sup>

14. *Id.* at 1244.

15. *Id.*

16. *Id.*

17. Jād al-Ḥaqq 'Alī Jād al-Ḥaqq, *Itifāqiyah al-Salām bayn Masr wa Isrā'īl wa Atharuhā*, 10 AL-FATĀWĀ AL-ISLAMIYYAH MIN DĀR AL-IFTĀ'ĀL-MISRIYYAH 3619 (1993).

The Islamic regulations of war demonstrate the pragmatic orientation of Islamic law. Furthermore, different jurists' applications of the principle of public interest have sometimes yielded contradictory rulings on similar issues. Characterizing Islamic law at large as a permanent and unchangeable set of sacred laws is therefore inaccurate. This common misconception in Western literature is the result of confusing *sharī'ah* (Qur'ān and Sunnah based laws) with *fiqh* (the rulings given by individual Muslim jurists). *Fiqh*, not *sharī'ah*, constitutes the greatest part of Islamic law.

Regrettably, both the *amān* system and international treaties have been grossly overlooked in the writings of most Western jurists who studied the Islamic laws and traditions of war, which Western jurists oversimplify into a holy war to convert non-Muslims. Such oversimplifications ignore both the complexity of classical Islamic doctrine and the changing paradigms of international relations. The two kinds of agreements with the enemy and Islamic *jus in bello* norms described above provide insight into the Islamic justifications for war and, therefore, reinforce the conclusion previously stated. The *amān* system grants non-Muslim enemy combatants and temporary residents of the Islamic state freedom of religion. Had the Islamic justification for war been the nonbelief of combatants, Muslims would have given their enemies the unenviable choice of either accepting Islam or being killed. Similarly, non-combatant immunity granted to the enemies of the Muslims, including their clergy, shows that nonbelief is not an authentically Islamic justification for going to war against non-Muslims.

Classical Muslim jurists of all schools developed a detailed and sophisticated Islamic international humanitarian law modeled after the Prophet Muhammad's conduct. The Islamic law of war was designed for a certain paradigm of international relations, aimed at regulating the conduct of Muslims during wartime. Classical Muslim jurists focused more on the subject of war because war was the norm in international relations in their time. Nevertheless, some modern jurists have argued that Islamic international law is often more detailed than modern international humanitarian law and the Geneva Conventions.<sup>18</sup>

18. See, e.g., Roger C. Algase, *Protection of Civilian Lives in Warfare: A Comparison Between Islamic Law and Modern International Law Concerning the Conduct of Hostilities*, 16 REV. DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 248 (1977) (Roger C. Algase points out that the Islamic law of war "strikes a balance between military necessity and respect for human life in a manner which gives a higher priority to saving the lives of non-combatants than does modern international law."); See also, e.g., Karima Bennoune, *As-Salāmū aAlaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 623 (1994) (Karima Bennoune writes that "more than a millennium before the codification of the Geneva Conventions, most of the fundamental categories of protection which the Conventions offer could be found, in a basic form, in Islamic teachings."); See also, e.g., Troy S. Thomas, *Prisoners of War in Islam: A Legal Inquiry*, 87 THE MUSLIM WORLD 44, 52 (1997) (statement of Troy S. Thomas) ("In many respects, *siyar* actually supersedes the Geneva Convention."); See also, e.g., Saleem Marsoof, *Islam and International Humanitarian Law*, 15 SRI LANKA J. OF INT'L L. 23, 27 (2003) (statement of Saleem Marsoof, Judge at the Court of Appeal in Sri Lanka) ("[I]slamic rules relating to the conduct of war, the treatment of civilians, refugees and prisoners are more elaborate and just than even the rules contained in modern international conventions and protocols containing the principles of the modern International Humanitarian Law.").



In response to the second question posed at the beginning of this paper, the comparison between classical Islamic international humanitarian law and the Geneva Conventions is arbitrary. Islamic international humanitarian law emerged as a set of rules voluntarily imposed upon Muslims by themselves regardless of the conduct of their enemies during war. The Islamic laws of war can be seen as an attempt by the jurists to balance the precedents set by the Prophet on the one hand and the exigencies of defense on the other. State armies at present follow the Geneva Conventions because of their contractual nature.

However, similar to the main objective of the Geneva Conventions, and despite their differing historical context out of which they were borne, classical Muslim jurists' primary concern was saving the lives of innocent civilians and minimizing damage to property. Ostensibly, the prerogative to protect enemy property might be a pragmatic move to preserve enemy property as spoils in the event of victory. This paper argues, however, that one major problem with Islamic international law is that it has been coopted by today's terrorist groups to justify the indiscriminate killings of innocent Muslim and non-Muslim civilians alike. While adhering to the Geneva Conventions and their Additional Protocols is obligatory upon Muslims, because their countries are contracting members to these treaties, terrible tragedies can and do materialize nonetheless because of selective reliance on certain rulings by terrorist groups.

### 3. DOMESTIC ARMED CONFLICTS

Al-Sarakhsī also treats under the same chapter of *siyar* two of the four kinds of domestic conflicts discussed in classical Islamic law books: (1) fighting against *al-murtadīn* ("apostates") and (2) fighting against *al-bughāh* ("rebels" or "secessionists"). The other two kinds of domestic conflicts include (3) fighting against *al-khawārij* ("violent religious fanatics") and (4) fighting against *quṭṭā' al-ṭarīq* ("bandits," "highway robbers," and "pirates"), or *al-muḥāribūn* ("warriors" or "fighters"). Al-Sarakhsī treats fighting against *quṭṭā' al-ṭarīq* under the chapter dealing with theft, and conflates *bughāh* with *khawārij*. This discussion will be limited to the last two categories, *baghy* (rebellion) and *ḥirābah* (banditry/terrorism), because they are relevant today.

#### 3.1 REBELLION

Jurists' treatment of this subject is based on both the scripture and certain precedents that developed during the reign of the fourth caliph 'Alī ibn Abī Ṭālib (656-61 AH). Thus, it is very likely that if these two sources did not address a certain subject, Muslim jurists would not explore the issue. Additionally, that Muslim jurists relied heavily in formulating the Islamic law of rebellion on precedent established during the third decade after the death of the Prophet gives us further insight into the nature of Islamic law. This further disproves the misconception that Islamic law is an unchangeable legal system rooted in one sacred text.

Concerning the scriptural basis for the law of rebellion, the jurists refer only to the following Qur'ānic verse:

And if two parties of the believers fight each other, then bring reconciliation between them. And if one of them transgresses against the other, then fight against the one who transgresses until it returns to the ordinance of God. But if it returns, then bring reconciliation between them according to the dictates of justice and be fair. Indeed God loves those who are fair.<sup>19</sup>

Al-Sarakhsī's discussion here shows that he did not contemplate the third question raised at the beginning of this paper. As was typical of a majority of Muslim jurists, al-Sarakhsī was more concerned with setting the rules regulating the conduct of Muslims during rebellion, not with providing a test for determining the justifiability of rebellion. A minority of jurists who ventured into answering this serious question were extremely reluctant and succinct. In brief, those who addressed this question permitted rebellion against a Muslim ruler only in cases in which he apostatized from Islam or if he commanded Muslims to violate the dictates of the *sharī'ah*. Moreover, a small minority of Muslim jurists, including Ibn 'Uqayl, Ibn al-Jawzī, al-Juwaynī, and later Rashīd Riḍā (d. 1354 A.H./1935 CE), permitted rebellion against a tyrant ruler only after exhausting all alternative peaceful means. Nonetheless, the majority of jurists prefer that Muslims endure tyranny and injustice rather than resorting to the use of force to overthrow a ruler.

Here, the jurists give priority to protecting the dictates of the *sharī'ah* over the shedding of Muslim blood. This judgment is based on the Islamic dictum "there is no obedience to a human being in matters that involve disobedience to the Creator."<sup>20</sup> This shows the importance of the application of Islamic law in Islamic thought and explains the rising call for a greater application of Islamic law in Muslim and some non-Muslim countries alike. But when it comes to balancing their judgment between a Muslim regime's aggressions against the rights of its citizens on the one hand and the shedding of Muslim blood on the other, the majority of jurists compromised the rights of citizens to prevent bloodshed. A majority of jurists hinged their interpretation accordingly on the pragmatic consideration that enduring tyranny and injustice is a lesser evil than the destruction of lives and property.<sup>21</sup> The tragic recurrence of civil wars during the third decade of the Islamic era contributed directly to this approach.

Islamic jurists outlined three conditions that must be satisfied to warrant the use of force by rebels. First, a rebel must possess *man'ah* and *shawkah* (force and power). Most jurists did not specify the amount of force the rebels must possess, but those who addressed this point merely set general parameters in terms of a certain number of rebels. Their objective was to ensure the existence of popular support for the rebellion. Moreover, this gives an indication that the rebels might have a legitimate cause. Second, rebels must have a justification or reason based on an injustice incurred upon them, or their belief that *sharī'ah* has been violated by the ruler that

19. QUR'AN 49:9.

20. AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* 153 (2011).

21. See 'ABD AL-QĀDIR 'AWDAH, *AL-TASHRĪ'ĀL-JINĀ'Ī AL-ISLĀMĪ* 688 (n.d.) [hereinafter 'AWDAH].

prompted them to use force. Third, they must recourse to the act of *khurūj*, armed rebellion against the regime.

Concerning *khurūj*, al-Sarakhsī narrates that a certain Kathīr Al-Ḥaḍramī once entered the Kufah Mosque and found five people insulting the fourth caliph 'Alī ibn Abī Ṭālib, one of whom was vowing to kill him. Al-Ḥaḍramī caught the would-be killer and brought him to Caliph Alī for due punishment. Al-Ḥaḍramī was astonished when Alī told him to release the man because he could not be punished for something that he had not yet committed. This story stands for the proposition that there must be an actual use of force against the ruler, which would then allow him to target the rebels.<sup>22</sup> In fact, Mālik, Shāfi'ī, Ibn Ḥanbal and the Zāhirīs agree with this opinion, while for Abū Ḥanifah the mere fact of the rebels' preparation for the use of violence is sufficient for the ruler to take appropriate actions against them, otherwise he may be unable to control the situation were he to wait until they actually use violence.<sup>23</sup>

Al-Sarakhsī also concludes that this story proves that there is no discretionary punishment in Islam for insulting.<sup>24</sup> This story, and the Islamic rulings grounded upon it by al-Sarakhsī, show a great degree of freedom of speech whereby Muslims can challenge and criticize their Muslim rulers. In modern Muslim countries, however, criticizing a ruler, the royal family, an army, or even the judiciary is criminalized. Recently, journalists have been imprisoned for merely criticizing certain Muslim rulers.<sup>25</sup>

If a group of Muslims rebels satisfies these three conditions, then the state is obligated to attempt to negotiate with them in an effort to convince them to give up their violent plan. This ruling is based on the precedents set by the fourth caliph, who sent Ibn 'Abbās (d. 68 AH/668 CE) to convince the rebels at the battles of al-Jamal 36 AH/656 CE and al-Nahrawān 38 AH/658 CE to stop their plan to use violence.<sup>26</sup>

However, if the rebels reject the calls for peaceful resolution and have already used force, then al-Sarakhsī advocates that it is permissible to utilize any of the weapons and tactics permissible in the war against *ahl al-ḥarb*, including shooting with arrows or mangonels (a weapon for catapulting large stones), flooding or burning fortifications, and attacking by night.<sup>27</sup> One rule governing combat against rebels is that a retreating rebel cannot be pursued during combat and rebels-turned-POWs cannot be executed unless they still have another group to which they may join in order to continue fighting.<sup>28</sup> However, Shāfi'ī and Ḥanbalī jurists prohibit the use of such weapons that may kill indiscriminately.<sup>29</sup> Al-Sarakhsī's harsh position here is

22. AL-SARAKHSĪ, *supra* note 3, at 1266.

23. See 'AWDAH, *supra* note 21, at 677.

24. AL-SARAKHSĪ, *supra* note 3, at 1267.

25. See, e.g. BBC, [http://news.bbc.co.uk/1/hi/world/middle\\_east/5118876.stm](http://news.bbc.co.uk/1/hi/world/middle_east/5118876.stm); BBC, [http://news.bbc.co.uk/2/hi/middle\\_east/8008589.stm](http://news.bbc.co.uk/2/hi/middle_east/8008589.stm).

26. *Id.* at 1268; See also MUHAMMAD AL-KHATĪB AL-SHIRBĪNĪ, MUGHNĪ AL-MUHTĀJ ILĀ MA'RIFAH MA'ĀNĪ ALFĀZ AL-MINHĀJ 126 (n.d.); IBN QUDĀMAH, *supra* note 9, at 5.

27. AL-SARAKHSĪ, *supra* note 3, at 1268.

28. *Id.* at 1267.

29. See MUHAMMAD IBN ABĪ AL-'ABBĀS AHMAD IBN HAMZAH AL-RAMLĪ, NIḤĀYAH AL-MUHTĀJ ILĀ SHARH AL-MINHĀJ 407 (1984); IBN QUDĀMAH, *supra* note 9, at 7.

based on mere military calculations and not on scriptural basis or even precedent. He unjustifiably ignores the lenient rules of combat against rebels because of the fear that escaping or captured rebels may join another group to continue the fighting.<sup>30</sup> This also contradicts the generally accepted view that the objective of fighting against rebels is to stop their use of violence. The objective is not to kill them. The unnecessary use of force granted to the state army by al-Sarakhsī may be used to sanction indiscriminate or massive killings of rebels.

The jurists of the four schools unanimously recognize the sanctity of rebel property. Any property confiscated from rebels during combat must be returned to them after the cessation of hostilities. If the state confiscated horses, weapons, or both, then the horses must be sold and their value returned to the rebels after the cessation of fighting. This is because, as al-Sarakhsī points out, the treasury of the Islamic state should not bear the cost of taking care of the horses. But as for weapons, the state should keep the confiscated weapons as long as fighting continues and return them to the rebels after fighting ceases. The state army is authorized to use these confiscated horses and weapons to fight against rebels only if necessary.<sup>31</sup>

Furthermore, Islamic jurists unanimously agree that once war comes to an end, both the state army and the rebels will not be held liable for any destruction caused to lives and properties during the acts of hostility. Both will, however, be held liable for any damage they cause before or after the fighting. In other words, any damage caused must be a military necessity or directed to achieving the purpose of rebellion. This reinforces several principles. First, rebels are not punished for their recourse to violence provided that the three necessary conditions for justifiable rebellion are fulfilled. Second, Muslims jurists did not categorically prohibit rebellion; they neither mandate blind support for any Muslim state nor issue a blank check to rebels to resort to violence. They laid down a well-structured law of rebellion to ensure that rebels potentially, though not necessarily, have a legitimate cause. Third, the Islamic law of rebellion establishes an Islamic law against tyranny. In doing so, jurists played the role of the Muslim conscience struggling to protect society from the spread of injustice and tyranny. These jurists did so amidst the context of several bloody civil wars. It may be argued they managed to save Muslims throughout history from the scourge of even more civil wars. However, this jurisprudence was not nearly as successful at putting an end to tyranny and the misuse of power in the Muslim world.

### 3.2 BANDITRY

As noted above, resort to armed rebellion in Islam is not necessarily a crime. The crime of *ḥirābah* (banditry), the equivalent of what is today called terrorism, is the most severely punished crime in Islam. The phenomenon of terrorism under Islamic law became highly visible after the 9/11 terrorist attacks. Moreover, the claim propagated by some that Islamic teachings caused the terrorist attacks failed to receive adequate and critical jurisprudential investigation. In fact, in the post-United

30. AL-DAWOODY, *supra* note 20, at 300-314.

31. AL-SARAKHSĪ, *supra* note 3, at 1267.

Nations world, and after liberation of most of the Muslim world from European colonialism, the use of terrorism by extremist Muslim groups has come to the forefront of all forms of violence used by Muslims. The Islamic law of *ḥirābah* is based on the following Qur'ānic text:

Indeed, the retribution for those who make war upon (*yuḥāribūn*) God and His Messenger and strive to make *fasād* (destruction, damage) in the land is that they be killed *or* [emphasis added here and below] gibbeted *or* have their hands and feet amputated from opposite sides *or* they be banished from the land; this is a degradation for them in this world and in the Hereafter they will receive a grave chastisement. Excluded [from this retribution] are those who repent before you capture them; and be sure that God is All-Forgiving All-Merciful.<sup>32</sup>

Jurists of the four schools of Islamic law describe the main elements of this crime as: a group of Muslims who under the threat or use of armed attack or merely intimidating or terrorizing their victims in order to overtly and forcefully rob, kill or terrorize.<sup>33</sup>

This definition bears striking similarities to modern-day terrorism. First, the perpetrators must possess *man'ah* and *shawkah* (power and force by which they overcome their victims and defend themselves). This is why the Qur'ān describes them as *muḥāribūn* (warriors or fighters), as al-Sarakhsī explains.<sup>34</sup>

The second element is the use of arms to rob, kill, rape or destroy the limbs of their victims. It is the specific context in which these crimes are committed that establishes liability under the law of *ḥirābah*. What distinguishes the *ḥirābah* context is the organized use of force by a group of outlaws against innocent civilians who committed no wrongdoing. The Qur'ān describes the use of force accordingly as an act of waging war against God and His Messenger.<sup>35</sup> This is so, for the organized use of criminal violence is a challenge to state authorities and a threat to society. Furthermore, this crime instills widespread fear in innocent and helpless victims. The element of helplessness is an essential element in this crime: victims must be left defenseless and unable to be rescued. For this reason, the application of the law of *ḥirābah* has been limited by some to certain crimes committed in the desert and unpopulated areas because victims in these places cannot be easily rescued by police. Al-Sarakhsī explains that law of *ḥirābah*'s application was limited because in his time, the inhabitants of cities almost always carried arms for their protection.

More interestingly, the mere act of threatening to use force or intimidating without committing any of the criminal acts mentioned above falls under the law of *ḥirābah*. Some jurists advocate that threatening to use force qualifies as an act of *ḥirābah*. The example given by some involves a group of criminals who threaten to use force to prevent a group of people from taking a certain route.<sup>36</sup> The criminals

32. QUR'ĀN 5:33-34.

33. AL-DAWOODY, *supra* note 20, at 317.

34. AL-SARAKHSĪ, *supra* note 3, at 1190.

35. QUR'ĀN 5:33.

36. MUHAMMAD 'ALLĪSH, MINAH AL-JALĪL SHARH 'ALĀ MUKHTASAR SAYYID KHALĪL 336 (1989); MUHAMMAD IBN YŪSUF IBN ABĪ AL-QĀSIM AL-'ABDARĪ, AL-TĀJ WA AL-IKLĪL 314 (2d ed. 1977).

of *ḥirābah* who terrorize and intimidate their victims without committing any of the other criminal acts associated with this crime are punished by exile or imprisonment according to Ḥanafī jurists.<sup>37</sup>

Thus, the crime of *ḥirābah* resembles modern day domestic terrorism in many respects. Another requirement of *ḥirābah* is that the perpetrators and victims must be Muslims or *dhimmīs*. The law of *ḥirābah* addresses a unique form of what therefore may be called domestic terrorism. Both the perpetrators of *ḥirābah* and present-day terrorism use organized and premeditated violence against innocent civilians who committed no wrongdoing and who are unprepared for a violent confrontation. The victimization of the targets of both *ḥirābah* and present-day terrorism is a principal element. In the words of classical Muslim jurists, the victims here are left helpless and defenseless, whether in the desert or also in populated areas, according to the majority of the jurists. The victims of modern-day terrorism must be similarly situated; whether they are in their homes or work places, walking down the streets or on board public transportation, victims of terrorism are stealthily attacked for no apparent reason. The victims here are typically defenseless. The defenselessness and victimization of the targets of terrorist acts certainly instills widespread terror across society because anyone could be a target.

The main difference between *ḥirābah* and modern day terrorism lies in the objective of terrorists. Current definitions of terrorism focus mainly on the politically motivated acts of terrorism,<sup>38</sup> while *ḥirābah* focuses primarily on criminal acts committed in a certain context. For classical Muslim jurists, the objective of those guilty of committing *ḥirābah* was usually, though not always, pecuniary. Hence, the approach of classical Muslim jurists in defining this crime is more pragmatic and simpler than the countless modern attempts to define terrorism. Second, Islamic law shows a greater concern for the harm that befalls victims and society as a whole, irrespective of the perpetrators' motivations.

Punishment for the crime of *ḥirābah* is only available when both the perpetrators and victims of this crime are Muslim or *dhimmīs*, and punishment is only available for crimes that occur within Islamic territories. Even if such crimes took place in a territory controlled by Muslim rebels or secessionists, the ruler of the Islamic state still cannot inflict the *ḥirābah* punishment on the criminals. Instead, it is the duty of the ruler of the rebels or secessionists to inflict this punishment on them.<sup>39</sup> Moreover, if a group of Muslims or *dhimmīs* commit this crime against the temporary non-Muslim residents of the Islamic state, then the punishment prescribed for *ḥirābah* will not be inflicted on them. Al-Sarakhsī adds that they will however be held liable for the destruction of the lives and property of their victims and rulers can enforce a discretionary punishment for intimidating their victims.<sup>40</sup>

The Qur'ānic text quoted above prescribes four specific punishments for those convicted of the crime of *ḥirābah*. Execution and gibbeting are the prescribed

37. AL-DAWOODY, *supra* note 20, at 357.

38. AL-DAWOODY, *supra* note 20, at 349-361.

39. AL-SARAKHSĪ, *supra* note 3, at 1195.

40. *Id.* at 1190.

punishments of the culprits of *ḥirābah* who kill and rob their victims, while execution is the prescribed punishment only for those who kill their victims without robbing them. Amputation of the right hand and left foot is the prescribed punishment for the culprits of *ḥirābah* who only rob their victims. Exile or imprisonment is the prescribed punishment for those who merely terrorize without committing any of the above criminal acts. Some jurists believe that a judge has the discretion to choose any of the four punishments for one convicted of *ḥirābah*.<sup>41</sup> Judicial discretion as such hinges on which punishment most deters repeat offenses. If a culprit of *ḥirābah* is a skilled premeditator, he is to be executed. If he lacks this foresight but has the physical strength to commit the crime, then his right hand and left foot are to be amputated. If he has neither the skill to plan the crime nor the bodily strength to commit it, then the judge may imprison or exile him. Many jurists advocate that an accomplice receive the same punishment as the perpetrator.<sup>42</sup>

#### 4. CONCLUSION

*Al-Mabsut* qualifies Al-Sarakhsī as one of the greatest Islamic jurists. His interpretation of the Islamic law of war embodies two principal objectives. First, to ensure that Muslims abide by the dictates of the Qur'ān and the Prophetic tradition with respect to minimizing the loss of life and damage to property. Second, Muslim leaders are often called upon to hinge their decisions on the public interest. That the public interest is accordingly built into such decisions reflects the flexible, yet principled, nature of Islamic laws.

Al-Sarakhsī's contribution to the Islamic law of war is the product of both the Islamic legal tradition on the one hand, and the context of the world he lived in on the other. In formulating the above rulings, al-Sarakhsī followed Islamic jurisprudence amidst a warring context quite different from ours. Additionally, this paper has attempted to demonstrate that classical Muslim jurists issued conflicting rulings on similar issues. Therefore, the first major conclusion of this paper is that a large part of Islamic rulings regulating the conduct of Muslims during war must be re-interpreted to reflect current international norms. Al-Sarakhsī's rulings have survived centuries and will continue to be studied and consulted as a reference. These legal interpretations, however, must be revisited and reevaluated in order to achieve their objectives and if they are to be applied in new situations. The rulings advocated by al-Sarakhsī concerning the permissibility of attacking human shields and the execution of POWs have been abused by today's terrorists to justify the indiscriminate and unlawful killings of innocent civilians.

The Islamic law of rebellion and the treatment of the phenomenon of terrorism could contribute to the maintenance of world peace and security. The Islamic legal approach to defining what constitutes terrorism prevents the political misuse of this crime. Furthermore, the severe punishment prescribed for convicted terrorists has

41. See 'AWDAH, *supra* note 21, at 647; Sherman A. Jackson, *Domestic Terrorism in the Islamic Legal Tradition*, 91 THE MUSLIM WORLD 293 (2001).

42. *Id.* at 1191.

the potential to deter future acts. The Islamic law of rebellion developed by classical Muslim jurists of the second and third centuries permits the political opponents of the Islamic state to challenge, and under certain conditions violently overthrow, the Muslim regime. But before resorting to force, the law of rebellion obliges the Islamic state to enter into discussions with the rebels and to address their grievances. This Islamic legal policy for addressing rebels' demands ought to have been mechanized to ensure peaceful regime changes, which is essential to stabilizing today's Muslim world. Stability, as such, quite possibly hinges on the application of al-Sarakhsī's Islamic jurisprudence on war and warfare.