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Eserde yer alan bildirilerde ileri sürülen görüşlerin bilimsel sorumluluğu sahiplerine aittir.
Al-Sarakhsi's Contribution to the Islamic Law of War

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1. Introduction

This paper examines the contribution of the great Hanafi jurist al-Sarakhsi (d. 483/1090-1) to the development of both the Islamic *jus ad bellum* (the justifications for resorting to war) and the Islamic *jus in bello* (the rules regulating the conduct of war) in both international and domestic armed conflicts. It studies the various kinds of use of force by both state and non-state actors in al-Sarakhsi's monumental work *al-Mabsüt* in order to find out how al-Sarakhsi would answer the following questions: first, does Islam sanction offensive war against non-Muslims because of their religious beliefs. Second, how far the Islamic *jus in bello* rules agree or disagree with the four Geneva Conventions of 1949, and their Additional Protocols. Third, does Islamic law permit Muslims to rebel against the ruler/s of the Islamic state and to use force to change their government under any circumstances? Four, does classical Islamic law treat the issues of international and domestic terrorism and if the answer is to the affirmative then what constitutes terrorism and what is the punishment for terrorists and their accomplices under Islamic law?

This paper compares al-Sarakhsi's opinions with those of other prominent Hanafi, Malikî, Shâfi'i and Hanbali jurists on the subject of the Islamic law of war. Al-Sarakhsi's answers to the above questions may provide some indications into the potential impact the law of war of one of the world's greatest legal

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1 I relied on my PhD thesis entitled "War in Islamic Law: Justifications and Regulations" in some parts of this paper.

2 Al-Azhar University, Cairo.
systems may have on the peace of our globalized world. This paper argues that certain rules developed by al-Sarakhsi below concerning regulating the conduct of the Muslim army in the primitive war contexts of his time must be revisited and re-evaluated by contemporary Muslim jurists in the light of the new war situations, on the one hand, and the different international and domestic contexts, on the other.

2. International War

In fact, classical Muslim jurists did not use the classification international versus domestic wars as such. They discussed the Islamic law of war under different chapters such as jihad or siyar. The Hanafi jurists including al-Sarakhsi treated the subject under the chapter of siyar. The word siyar, singular sirah, as explained by al-Sarakhsi, refers, on the one hand, to the ways in which Muslims dealt with the polytheists/unbelievers of the dār al-harb including both those with whom Muslims concluded peace treaties or not, i.e., the enemies. Here siyar refers to what may be called international wars or, more precisely, international law because here it refers to the treatment of the citizens of any foreign country during the times of peace and war. That is because all Muslims had been united under the caliphate system. On the other hand, siyar also refers, al-Sarakhsi adds, to the laws governing the treatment with ahl al-dhimmah (permanent non-Muslim citizens of the Islamic state), al-murtadīn (apostates) and ahl al-baghy (rebels, secessionists). Thus, siyar here partly refers to domestic conflicts in Islamic law.

It is worthy adding here that classical Muslim jurists discussed various issues regulating the treatment of Muslims with the dār al-harb in times of both peace and war. Al-Sarakhsi discussed under the title siyar the following seven issues: Islamic international humanitarian law, the booty, jīzah (tax levied on ahl al-dhimmah to exempt eligible males from conscription), peace treaties with the leaders of the dār al-harb, marriage and trade between Muslims and the dār al-harb, the treatment of apostates, and the treatment of rebels.

2.1 Islamic Justifications for War

Examining the Islamic justifications for war against non-Muslims is crucially important in understanding the Islamic law of war – jihad – the most misunderstood Islamic tradition for the west. However, classical Muslim jurists
did not, as noticed by many modern scholars, pay adequate attention to addressing this issue. It was Ibn Taymiyyah (d. 728/1328) who was the first Muslim scholar to write a manuscript dedicated solely to the treatment of this issue. This manuscript was republished in 2004 by the Saudi academic 'Abd al-'Aziz ibn 'Abd Allah ibn Ibrahim al-Zayd Al Hamad under the title Qa'idah Mukhtasar'ah fi Qid al-Kuffar wa Muhadananhim wa Tahrim Qatlihim li-Mujarrad Kufrihim (A Concise Rule for Fighting against Unbelievers and Making a Truce with Them and the Prohibition of Killing Them Solely because of their Unbelief). In fact, classical Muslim jurists' systematic approach to the discussion of the subject, including al-Sarakhsi's, adds to the misunderstanding surrounding the Islamic justifications for war against non-Muslims. Al-Sarakhsi starts his treatment of the subject by stating that Muslims "have to call polytheists to the religion [of Islam] and to fight against those who reject it." He adds that it is well-established that jihad against polytheists is obligatory until the day of judgement. More importantly here, al-Sarakhsi, like all Muslim jurists, explain that jihad are of two kinds: (1) fard 'ayn (personal duty of every capable person) referring to the defensive war, mainly, when the enemy invades the Muslim territories or what the jurists call (jihad al-daf') and (2) fard kifayah (collective duty on the Muslims, which may be fulfilled if sufficient numbers perform it) referring to the military campaigns waged by the Islamic state to convey the message of the religion of Islam in the non-Muslim territories or what is termed by the jurists as jihad al-talab. A war takes place in this case if non-Muslims refuse to accept the religion of Islam or, alternatively, pay the jizyah.

The concern here is with the second kind of jihad, i.e., the jihad al-talab, whose aim — as the jurists unanimously agree — is conveying the message of Islam. Hence, this kind of jihad may be described as militarized missionary campaigns.

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paigns. If according to this kind, non-Muslims are offered the above two options, namely, accepting Islam or paying a tax to the Islamic state, before Muslims resort to the use of force, then the core question still remains unanswered: why do Muslims may initiate a war against non-Muslims, particularly, since non-Muslims may reject the message of Islam and pay the jizyah. Put differently, are Muslims required by the teachings of Islam to wage a war against non-Muslims because of their unbelief or because of their hostility towards the preaching of Islam?

In fact, classical Muslim jurists disagree over this question into two groups: (1) according to the majority of the jurists including the Hanafi, Maliki and Hanbali jurists, the Islamic justification for war is aggression and hostility of the enemy. But this Islamic conception of hostility extends to include – in addition to finah (religious persecution of the Muslims) – aggression against the Muslims’ obligation to preach Islam in the non-Muslim territories. Shaykh Yusuf al-Qaradawi points out that in the past the Islamic state resorted to this kind of jihad because the non-Muslim regimes at that time did not allow the Islamic state to preach Islam to their peoples. But it stands to reason that, no one would call for such a kind of jihad at the modern time because Muslims at present can preach their religion freely to the inhabitants of any part of the world even without physically travelling there. (2) According to the minority group, al-Shafi’i (d. 204/820) and some Hanbali jurists – yet unnamed – and Ibn Hazm (d. 456/1064) of the extinct Zahiri school, the Islamic justifications for war is the enemy’s unbelief. However, they agree that Muslims may resort to fighting against the enemies if they reject Islam and the payment of jizyah.

Therefore, the confusion surrounding the justification for going to war against non-Muslims is strongly linked to the religion of Islam. That is because Muslims are required to convey Islam to the non-Muslims and to fulfil this obligation Muslims resorted to this form of militarized missionary at certain times for the reason mentioned above. This obligation to preach Islam has led some to conclude that Muslims fight against their enemies because of the latter’s unbelief. But this understanding is flawed because if this understanding were true then Muslims would not have accepted jizyah from the non-Muslims.

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In fact, al-Sarakhsi explains that money is not the aim of imposing jizyah on the non-Muslims. By their determination on the rejection of Islam and accepting to paying the jizyah, there is no ground for fighting and, therefore, perhaps after living in peace with the Muslims, non-Muslims may convert to Islam after they realize the great aspects of this religion, al-Sarakhsi adds.  

Moreover, the confusion is also caused when modern scholars dissociate the classical Muslim jurists' opinions from their historical and situational contexts and apply them to completely different ones. It is worth quoting here al-Sarakhsi who beautifully writes that: "although kufr [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-jaza', (the abode of recompense, the Hereafter)." Therefore, in answer to the first question raised at the beginning of this paper, deciphering the classical Muslim jurists' justifications for war in the post-United Nations world, it may be concluded that the Islamic justifications for war are aggression against the Muslim territories and religious persecution of the Muslims. This conclusion can be reinforced in the following examination of the Islamic jus in bello norms.

2.2 Islamic International Humanitarian Law

Al-Sarakhsi, like the rest of the Muslim jurists, treats at great details the Islamic rules regulating the conduct of Muslims during war. It does not necessarily mean here during the war operations only, but, as referred to above, during the existence of a state of war, or more precisely the lack of a peace treaty between the Islamic state and the non-Muslim territories. The main concern of al-Sarakhsi here, as can be easily noticed, is to subject the Muslims to the Islamic rules set in the Qur'ān and the tradition of the Prophet, one the one hand, and to win the war, on the other. That is to say that, in developing, and abiding by, the Islamic law of war, Muslims, first, impose the dictates of their religion upon themselves and, second, attempt to achieve victory or what fulfils the public interest of the Islamic state. The discussion here will be limited to the following issues because they could have direct bearing on the use of force by Muslims at present: the protection of civilians, the permissibility of attacking

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8 Ibid., Vol. 1, p. 1258.
the enemy by night and attacking the human shields, prisoners of war, and peace treaties with the enemies.

2.2.1 Protection of Civilians

Based on a Prophet’s hadith, al-Sarakhsi prohibits targeting children, women and the aged during the war operations. He points out that these categories are not to be targeted because they do not engage in fighting. But, he adds that, if an aged person helps the enemy in planning the war, then he can be targeted.9 Al-Sarakhsi mentions only these three categories as enjoying the non-combatant immunity despite the fact that other hadiths add the clergy and al-‘asif (any hired man) to the list of those who cannot be targeted during the fighting. It is worth adding here that as a consequence of the jurists’ disagreement on the justifications for war, the majority who believe that aggression and hostility of the enemy are the Islamic justifications for war, extend the list of those who enjoy the non-combatant immunity to include the blind, the sick, the incapacitated, the insane, framers, craftsmen and traders. But the jurists agree that if any of these categories engage in the fighting, they forfeit the right to non-combatant immunity. However, the minority who believe that unbelief in itself is a justification for war, argue that apart from women, children and the clergy, anyone who rejects Islam or the payment of jizyah can be targeted during the fighting.

This means that according to the majority’s position fighting is permissible against enemy belligerents only. Thus, James Turner Johnson concludes that, “The [Islamic] position is clear: there is no justification for warfare directed intentionally against noncombatants in jihad.”10 But, it is worth adding here that, this full-blown non-combatant immunity doctrine developed by the classical Muslim jurists is entirely based on the Prophet’s commands and not originated by the jurists’ ethical concern for protecting the lives of innocent civilians.

9 Ibid., Vol. 1, pp. 1199, 1211.
Night Attacks and Human Shields

Al-bayât (attacking the enemy by night) is one of the issues discussed by almost all the jurists who treated the subject. Attacking the enemy by night in the primitive war situations of the classical jurists means that the Muslim army will need to throw stones or fire at the enemy because the darkness prevents the two armies from fighting hand in hand. The main problem here is that these indiscriminate primitive weapons may endanger the lives of innocent civilians. Nonetheless, without any elaborations, al-Sarakhsı says that he does not object attacking the enemy by night. Although most of the jurists also permit bayât, others still believe that it is disliked. Al-Sarakhsı also permits the use of some other primitive weaponry that may indiscriminately kill innocent civilians such as throwing stones or fire at, or flooding, enemy fortifications. One of the other important issues which is discussed also by most of the classical jurists is called al-tatarrus (human shield). In this context, to stop the Muslims' attack, the enemy may use their civilians, mainly referred to as women and children, or in another case Muslim or dhimmi captives as human shields. In brief, the majority of the jurists permit attacking the human shield in both cases because of the military necessity, but under the condition that the Muslim army aims to direct its attack at the enemy combatants and avoid injuring the human shield.

The main point to be concluded from here is that al-Sarakhsı and many other classical Muslim jurists gave certain rulings that may lead to the indiscriminate killings of enemy non-combatants and even, in the last case, Muslim or dhimmi captives. Although these rulings were regulating the conduct of the

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Muslim army in certain primitive war contexts, some contemporary Muslim terrorists have resorted to such rulings, particularly, *bayāt* and *tatārrus* in order to justify their indiscriminate killings of innocent Muslim and non-Muslim civilians in Iraq and other places.\(^{15}\)

### 2.2.3 Prisoners of War

Al-Sarakhsi advocates that prisoners of war (POWs) cannot be exchanged for money or graciously set free, contrary to Šaḥī’ī’s opinion. Al-Sarakhsi agrees that the Prophet freed some of the Qurayshite POWs at the battle of Badr in exchange for money, but he believes that this was abrogated by the Qur’ān 8:67-77. Thus, he concludes that a POW is to be executed if he does not accept Islam. This position, however, contradicts the Hanafi position that unbelief in itself is not a justification for war. However, he advocates that the ruler may release POWs freely or in exchange for Muslim captives or for ransom if he finds this to be in the public interest of the Muslims.

It is worth adding here that, according to a group of the earliest Muslim scholars including Ibn ‘Abbās, ‘Abd Allah ibn ‘Umar (d. 73/693), al-Ḥasan al-Basrī (d. 110/728) and Sa‘īd ibn Jubayr (d. 95/714), based on the Qur’ānic injunction (47:4), POWs are to be released freely or in exchange.\(^{16}\) Moreover, the majority of the jurists give the ruler the freedom to choose whether to release them freely or in exchange, execute some or all of them or enslave them depending on what he considers to be in the public interest of the Muslims.

Therefore, the main points to be concluded from the discussion of this issue are that, first, al-Sarakhsī here is advocating that public interest overrides a

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Qur'anic-based ruling according to his opinion. Second, al-Sarakhsi's ruling permitting the execution of POWs may be used as a justification by Muslim terrorist groups to execute non-Muslim captives.

2.2.4 Peace Agreements

Al-Sarakhsi treated two kinds of agreements with the enemy: first, peace treaties between the ruler of the Islamic state and the rulers of the enemy states, i.e., international treaties and, second, the amān (lit. protection, safety) system which refers to both quarter and safe conduct contracts. Quarter may be given to enemy belligerents during war operations, while the safe conduct contracts refer to the protection granted to any non-Muslim citizen of an enemy state who desires to enter the Islamic state and stay there temporarily in order to pursue business or education, for example. Any Muslim individual can issue quarter and safe conduct contracts which guarantee the protection of the person and property of their holders. Thus, this form of quarter, as explained by classical Muslim jurists, parallels in certain respects the hors de combat status, as defined in Art. 41 of the Additional Protocol I, 8 June 1977, of the Geneva Conventions, while the safe conduct contract is similar to the modern visa system.

Concerning the peace treaties between the head of the Islamic state and the rulers of enemy states, or what al-Sarakhsi calls ahl al-harb, some light will be shed here on three cases envisaged by al-Sarakhsi. First case: if the enemy asks for a truce for some years bi-ghayr shay (lit. in return for nothing), i.e., in condition that the enemy will not pay the jizyah, then, al-Sarakhsi advocates that the head of the Islamic state may accept this agreement only if he finds it in the public interest of the Muslims.18

Second case: if the enemy forces besiege the Muslims and demand that the Islamic state pays them a certain amount of payment annually in return for a truce, then the head of the Islamic state should not accept this humiliating agreement unless in case of dire necessity, i.e., the enemy will exterminate the Muslims. In other words, al-Sarakhsı adds, the head of the Islamic state finds that this agreement is good for the Muslims. This ruling is based on the Prophet's initial agreement to pay half the produce of Medina to 'Ubaydah ibn

18 Ibid., Vol. 1, p. 1244.
Hüsân in return for withdrawing his forces from the coalition forces besieging the Muslims at the battle of the Ditch/Coalition in 5 AH/627 AD. This would be treaty was not concluded because some of the Companions of the Prophet convinced him not to conclude such a humiliating agreement. But the Prophet’s rationale for the initial acceptance of such a treaty was his desire to save the Muslims from extermination at the hand of their enemies who more than three times outnumbered the Muslims.19

Third case: if an enemy state asks for a truce for a certain number of years and that they will pay khārij (land tax) to the Islamic state but in condition that Islamic law will not be applied upon them in their territories, then, al-Sarakhsi again maintains that, the head of state should not accept this agreement unless it serves the best interest of the Muslims.20

It is obvious that al-Sarakhsi’s rulings in these three cases are based entirely on the principle of public interest. Interestingly enough, in 1979 the then Grand Mufti of Egypt and later the Grand Shaykh of Al-Azhar, Shaykh Jad al-Haqq ‘Ali Jad al-Haqq (d. 1996) entirely based his fatwā permitting the peace agreement between Egypt and Israel on the same principle of public interest. He explains that this peace agreement is Islāmically permissible because it has fulfilled the public interest since it liberated a large part of the Egyptian territories occupied by Israel in 1967. Hopefully, he adds that, this peace agreement will return the rest of the occupied territories and Jerusalem.21

Indeed, a large part of the Islāmic regulations treated under the subject of war shows the pragmatic nature of Islāmic law. Furthermore, inevitably, in their application of this rationally and contextually based principle of public interest, Muslim jurists have often given contradictory rulings on many issues. This is to conclude here that labelling Islāmic law at large as a permanent and unchangeable set of sacred laws is inaccurate. This common misconception in the Western literature is the result of confusing shari‘ah (Qur‘ān and Sunnah based laws) with fiqh (the rulings given by independent individual Muslim jurists) which constitutes, by far, the greatest part of Islāmic law.

19 Ibid.
20 Ibid., Vol. 1, pp. 1244 ff.
Regrettably, the discussion of both the *aman* system and international treaties has been grossly overlooked in the writings of most Western scholars who studied the Islamic tradition of war which has often been depicted as a holy war to convert non-Muslims by the sword. Such oversimplifications ignore both studying classical Islamic law books, on the one hand, and the paradigm of international relations at that time. These two kinds of agreements with the enemy and some of the above Islamic *jus in bello* norms give great insight into the Islamic justifications for war and, therefore, reinforce the conclusion reached above. The *aman* system grants non-Muslim enemy combatants and temporary residents of the Islamic state freedom of religion. Had the Islamic justification for war unbelief of their enemy, then Muslims would have given their enemies the choice of either accepting Islam or extermination. Similarly, the non-combatant immunity granted to the enemies of the Muslims including their clergy shows that unbelief is not the justification for going to war against non-Muslims.

Indeed, it is remarkable that classical Muslim jurists of all schools developed a detailed and sophisticated Islamic international humanitarian law which was moulded mainly on the context of the Prophet. That is to say that, the Islamic law of war was designed for a certain paradigm of international relations and aimed at regulating the conduct of the Muslims during certain primitive war situations. It should be added here that classical Muslim jurists focused more on the subject of war because war was the norm in international relations at their times unless a peace treaty was concluded between its parties. Nevertheless, some modern scholars have argued that Islamic international law is more detailed and superior than modern international humanitarian law and the Geneva Conventions.22

In answer to the second question posed at the beginning of this paper, at the outset, it should be mentioned here that the comparison between classical İslâmik international humanitarian law and the Geneva Conventions is arbitrary. İslâmik international humanitarian law emerged as a set of rules voluntarily imposed upon the Muslims by themselves regardless of the conduct of their enemies during war. The main objectives of the jurists are following the İslâmik rules as can be found in the precedents set by the Prophet, on the one hand, and winning the war, on the other. But 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 completely different war situations from those of classical İslâmik international humanitarian law, it can be easily noticed that the main concerns of the classical Muslim jurists were saving the lives of innocent civilians and avoiding causing damage to enemy property unless in case of dire military necessity. Pragmatically speaking, protecting enemy property is advantageous for the Muslim because if they win the war, enemy property becomes spoils for the Muslims. But this paper argues that the major problem with the İslâmik international humanitarian law is that some of the rulings permitting the use of certain weaponry or tactics that may cause indiscriminate killings of non-combatants in the primitive war situations of the classical Muslim jurists have been used by terrorist groups at the modern time as a proof justifying the indiscriminate killings of innocent Muslim and non-Muslim civilians. Although following the Geneva Conventions and their Additional Protocols is an obligation on the Muslims because their countries are contracting members of these treaties, still terrible tragedies could be caused by the terrorists' selective reliance on certain rulings.

3. Domestic Armed Conflicts

Al-Sarakhsi treats under the same chapter of *siyar* two of the four kinds of domestic conflicts discussed in classical Islamic law books, i.e., (1) fighting against al-murtadín (apostates) and (2) fighting against al-bughāh (rebels, secessionists). The other two kinds are (3) fighting against al-khawārij (roughly, violent religious fanatics) and (4) fighting against, what the Hanafi and Shāfi‘ī jurists call, quttā‘ al-tariq (bandits, highway robbers, pirates), or what jurists of the other schools call al-muhāribün, (lit. warriors, fighters). Al-Sarakhsi treats fighting against quttā‘ al-tariq under the Chapter of Theft, while he, like few other jurists, confuses bughāh with khawārij. Discussion below will be limited to the last two kinds of conflicts, i.e., baghā (rebellion) and hirābah (banditry/terrorism) because they may address the use of force by Muslims at present.

3.1 Rebellion

At the outset, it is worth mentioning here that the jurists’ treatment of this subject is based on both the scripture and certain precedents that took place during the reign of the fourth caliph ‘Alī ibn Abī Talib (r. 656-661). That is to say here that, first, it is very likely that if these two sources, i.e., the Qur’ān and the precedents of the Companions, did not address this subject, Muslim jurists would not have treated it. Second, the fact that Muslim jurists relied heavily in formulating the Islamic law of rebellion on the precedents set by the early Muslims during the third decade after the death of the Prophet gives another indication into the nature of Islamic law. In other words, that is to reiterate here that, in addition to the principle of public interest referred to above, relying on the conduct of the early Muslims as a source of law, disproves the claim that Islamic law is a sacred and unchangeable law system.

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.\(^{23}\)

\(^{23}\) Qur’ān 49:9. Translations of all Qur’ānic texts in this paper are mine.
It is interesting to note that the occasion of revelation of this verse, as explained by Muslim exegetes, refers to a small fight between few Muslim individuals. However, this verse became the scriptural basis for both the law of rebellion, on the one hand, and recently war between Muslim states, on the other. Despite its timely relevance and great importance, this subject has remained largely unstudied in the Western literature. The great importance of studying the Islamic law of rebellion at present is that it answers many pressing questions regarding the degree of freedom given to the internal political opponents of the Islamic state under Islamic law. Therefore, this study, hopefully, may indicate if there is a relation between the degree of freedom given to the citizens of the Islamic state to challenge peacefully or through the use of force their regimes and the lack of genuine democratic experiences in most of the Muslim world at present.

In answer to the third question raised at the beginning of this paper, al-Sarakhsi's discussion of the subject shows that this question does not cross his mind. In other words, as a typical characteristic of the greatest majority of the Muslim jurists, al-Sarakhsi is rather concerned with setting the rules regulating the conduct of the Muslims in case a rebellion takes place or is about to take place. In fact, specifically when it comes to this question, even the minority of the jurists who ventured into answering this serious question are extremely reluctant, succinct and cautious. Obviously the jurists' cautious treatment of this issue is due to their fear that their opinions might lead to the shedding of blood among the Muslims. In brief, those who addressed this question permit rebellion against the Muslim ruler only in cases he apostatizes from Islam or if he commands the Muslims to violate the dictates of the shari'ah. Moreover, a very tiny minority of the Muslim jurists including Ibn 'Uqayl, Ibn al-Jawzi, al-Juwayni, and later Rashid Rida (d. 1354/1935) permit rebellion against the tyrant ruler after exhausting all peaceful means of convincing him to stop his tyranny. Nonetheless, the greatest majority of the jurists prefer that Muslims endure tyranny and injustice rather than resorting to the use of force to overthrow the ruler because this will lead to the shedding of blood among the Muslims.


To sum up, in their cautious treatment of this question, the jurists balance their judgement between the regimes’ aggression against the shari’ah, on the one hand, and the shedding of Muslim blood, on the other. Here the jurists give priority to protecting the dictates of the shari’ah over the shedding of Muslim blood. This judgement is based on the Islamic dictum: there is no obedience to a human being in matter that involves disobedience to the Creator. This shows the importance given to the application of Islamic law in Islamic thought and explains the rising calls for a greater application of Islamic law in some Muslim countries and a partial application of it in certain non-Muslim countries.

But when it comes to balancing their judgement between the Muslim regimes’ aggression against the rights of its citizens, on the one hand, and the shedding of Muslim blood, on the other, the majority of the jurists compromised on the rights of the citizens grounding their opinion upon applying the juristic principle of “choosing the lesser of the two harms/evils.” That is because according to their pure pragmatic considerations, enduring the tyranny and injustice of the Muslim ruler is the lesser evil than the destruction of lives and property. Furthermore, it may be added here that the tragic memories of civil wars during the third decade of the Islamic era contributed to the jurists’ cautious approach to prevent such tragedies. This approach undoubtedly came sometimes at the cost of accepting tyranny and dictatorship.

Concerning the regulations of the law of rebellion, the jurists put three conditions for a group of Muslims who use force against state authorities in order to be treated as rebels: first, a group of Muslims must possess a degree of man’ah/shawkah (force, power). However, most of the jurists did not specify the amount of force the rebels should posses, but the rest who addressed this point merely set general parameters in terms of certain numbers of rebels or amount of military force they possess. Their objective here is to make sure that there must be a sort of a popular support for the resort to the use of violence and, therefore, not to give permission for an individual or a handful of individuals to use force against their regime. Moreover, this gives an indication that the rebels might have a legitimate cause. Second, rebels must have a ta’wil, a justification/reason or a rationale based on an injustice incurred upon them, or their belief that the dictates of the shari’ah is violated, by the ruler that prompted them to resort to force. Third, they must resort to the act of khurāj, armed rebellion against the regime.
Significantly, concerning *khurūj*, al-Sarakhsi narrates that a certain Kathir al-Hadrami once entered the Kufah Mosque and found five people insulting the fourth caliph ‘Ali ibn Abi Talib and one of them was vowing to kill him. Al-Hadrami caught the would-be killer and brought him to caliph ‘Ali for due punishment. Al-Hadrami was astonished when caliph ‘Ali told him to release the would-be killer because he cannot be punished for something that he did not commit. When al-Hadrami told the caliph that he insulted him, the caliph replied: “then insult him if you want or let him free.” Al-Sarakhsi concludes that this story proves that there must be an actual use of force, *khurūj*, against the ruler, so that he can “kill” or more accurately target the rebels. In fact, Mālik, Shāfi‘i, Ibn Hanbal 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 if he waited until they actually use violence.

No less importantly here, al-Sarakhsi also concludes that this story proves that there is no *ta‘zīr* (discretionary punishment) in Islam for *shatm*, insulting. This story and the Islamic rulings grounded upon it by al-Sarakhsi show a great degree of freedom granted to the Muslims to challenge, and *a fortiori* criticise, the Muslim rulers, let alone protect the right of freedom of speech. However, “insulting” the royal families, the rulers or the army and judiciary leads to prison in some Muslim countries. In fact, some journalists and MPs have been imprisoned recently for merely criticising certain Muslim rulers.

If a group of Muslims satisfy the above three conditions and prepare themselves for the use of violence, then state authorities have to call them for negotiations because they may be convinced to give up their plans for the use of violence. This ruling is based on the precedents set by the fourth caliph when he sent Ibn ‘Abbās (d. 68/668) to convince the rebels at battles of al-Jamal 36/656 and al-Nahrāwān 38/658 to stop their plans for the use of violence.

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However, if they reject the calls for peaceful resolution and already use force, then al-Sarakhsi advocates that it is permissible to use all the weapons and tactics used in the war against *ahl al-harb* such as shooting them with arrows or mangonels (a weapon for catapulting large stones), flooding or throwing fire at their fortifications and attacking them by night.\(^{30}\) Among the important rules of combat against the rebels/secessionists are that their escaping fighters cannot be pursued during the combat and their POWs cannot be executed unless, al-Sarakhsi adds, if they still have another group to which they may join in order to continue the fighting.\(^{31}\) However, contrary to this Hanafi position, the Shafi'i and Hanbali jurists prohibit the use of such weapons that may cause indiscriminate killings among the Muslims.\(^{32}\) Al-Sarakhsi's harsh position here is based on merely 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. This also contradicts the generally accepted view here that the objective of fighting against rebels is merely to force them to stop their use of violence and not to kill them. In other words, the unnecessary use of force granted above to the state army by al-Sarakhsi may be used to sanction indiscriminate or massive killings of rebels.

The jurists of the four schools unanimously recognize the sanctity of the rebels' property. Any property confiscated from the rebels during the combat must be returned to them after the cessation of hostilities. So if the state army confiscated horses and/or weapons, then the horses must be sold and their value must be given to the rebels after the cessation of fighting. That is because, al-Sarakhsi 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 is finished. Obviously, returning the confiscated weapons to the rebels during the fighting will strengthen them, al-Sarakhsi explains. But the


\(^{31}\) Ibid., Vol. 1, p. 1267.

state army can use these confiscated horses and weapons in the fighting against rebels in case of military necessity. 33

Furthermore, the jurists agree that once the war comes to an end, then both the state army and the rebels will not be held liable for any destruction they cause to the lives and property during the acts of hostilities. But they will be liable for any damage they cause before or after the fighting. In other words, such damage must be necessarily dictated by the military necessity and directed to achieving the purpose of rebellion. Therefore, this proves that, first, the rebels are not punished for their recourse to the use of violence against the state provided that the above three conditions are fulfilled and their use of violence is restricted to achieving their objective in the manner shown above. Second, the three conditions laid down above for the recourse to rebellion and the fact that the rebels are not punished for the damage they cause in the specific context given above, prove that Muslim jurists did not prohibit the recourse to rebellion. On the one hand, they did not give blind support to the regime and did not give a blank check to the rebels to use violence, on the other. They laid down a well-structured law of rebellion to ensure that the rebels potentially, though not necessarily, have a legitimate cause. Third, the Islamic law of rebellion proves that Muslim jurists practically and skilfully managed to develop a law that challenges tyranny. In doing so, those independent individual jurists played the role of the conscience of the Muslim nation who struggled here to protect their society from the spread of injustice and tyranny, on the one hand, and the atrocities committed during the bloody civil wars, on the other. In short, it may be argued here that they managed to a great extent to save the Muslims throughout history the scourge of civil wars, but they have not managed to achieve the same degree of success in putting an end to tyranny and the misuse of power in the Muslim world.

3.2 Banditry

As noted above, the resort to armed rebellion in Islam is not a crime and, therefore, the rebels are not punished provided that the three conditions are fulfilled and that they abide by the Islamic regulations of the conduct of war during this form of armed conflict. But the crime of *hirabah/qat' al-tariq* (ban-

ditry), or what is argued below, the equivalent of what is called today, in many of its forms, terrorism, is the most severely punished crime in Islam. The discussion of terrorism under Islamic law is of great timely importance especially after the 9/11 terrorist attacks. Moreover, the claim propagated by some that the Islamic teachings are the causes of terrorist acts perpetrated by Muslims should have received adequate scholarly investigation into this serious claim. In fact, in the post-United Nations world and after the liberation of most of the Muslim world, the use of terrorism by Muslim groups has come at the forefront of all the different forms of the use of violence by Muslims. However, it is regrettable that until the present time an authoritative and solid treatment of the subject of terrorism in Islamic law is yet to come. 34

The Islamic law of hiyâbah is wholly based on the following Qur’anic text:

Indeed, the retribution for those who yuhâribun (make war upon) God and His Messenger and strive to make fasâd (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. 35

The definitions of this crime given by the 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 arms attack or merely intimidate or terrorize their victims in order to overtly and forcefully rob, kill or merely terrorize their victims. 36

Hence, the following three main elements included in this definition indicate striking similarities between the nature and contexts of the crime of hiyâbah and modern day terrorism:

35 Qur’an 5:33-34.
(1) the perpetrators must be a group who possesses man'ah/shawkah power and force by which they overcome their victims and defend themselves. This is why the Qur'an describes them as muh(ar)ibün, i.e., warriors, fighters, al-Sarakhši explains.37

(2) The perpetrators use arms to rob, kill, rape or destroy the limbs of their victims. The point here is not committing these acts per se because the crimes of killing, stealing or destroying the limbs in the non-hirābah contexts are already treated under different laws. But it is the specific context in which these crimes are committed that renders the perpetrators liable to be tried under the law of hirābah. What distinguishes the hirābah context is the organized use of force by a group of outlaws against innocent civilians who committed no wrongdoing on their part. Hence, the perpetrators' use of force overtly here is metaphorically described by the Qur'an as an act of waging war against God and His Messenger.38 That is because, on the one hand, this form of organized use of criminal violence is a challenge to the state authorities and a threat to the security and economy of society at large. On the other hand and more importantly, this crime causes widespread fear and terror among ordinary innocent helpless victims. The element of helplessness is an essential element in this crime because the victims are left defenceless and cannot be rescued. For this reason, Abü Hanifah limited the application of the law of hirābah to the certain crimes committed in the desert and unpopulated areas because the victims in these places cannot be rescued by the police or the public unlike the victims who can be rescued in populated areas. Al-Sarakhši explains that Abü Hanifah did not apply the law of hirābah to the cities and other populated areas because in his time, the inhabitants of such areas used to carry up arms for their protection.

(3) More interestingly, the mere fact that the criminals threaten to use force or cause terror and intimidation without committing any of the criminal acts mentioned above falls under the law of hirābah. The Maliki jurists, in particular, advocate that threatening to use force qualifies as an act of hirābah. The example given by some Maliki jurists here is that if a group of criminals threaten to use force to prevent a group of people from taking a certain route to Syria or

38 Qur'an 5:33.
any other place.\textsuperscript{39} The criminals of hirabah who terrorize and intimidate their victims without committing any of the other criminal acts associated with this crime are punished by exile/imprisonment, according to the Hanafis, Shafis and Hanbalis, or by any of the following according to the Malikis: “execution, gibbeting, amputation of a hand and a foot from opposite sides or banishment/imprisonment.”\textsuperscript{40}

Therefore, the above three elements which constitute the crime of hirabah resemble in many aspects the nature and contexts of the modern day domestic terrorism. Stipulating for the punishment of hirabah that the perpetrators and victims must be Muslims or dhimmis shows that the law of hirabah addresses a unique form of what may be called domestic terrorism. Both the perpetrators of hirabah and present-day terrorism use organized and premeditated violence against innocent civilians who committed no wrongdoing towards them and who are unprepared for a violent confrontation. The victimization of the targets of both hirabah and present-day terrorism is a principal element. In the words of the classical Muslim jurists, the victims here are left helpless and defenceless whether in the desert, according to Abu Hanifah, or also in populated areas, according to the majority of the jurists. This context recalls in the memory the similar situations of the victims of present-day terrorism: whether they are staying at their homes or work places, walking down the streets or on board a means of transportation, victims of terrorism find themselves stealthily attacked or exploded for no guilt they committed towards their attackers. The victims here are usually defenceless and helpless civilian men, women and children. This situation certainly causes widespread terror among the entire society because anyone could be the target of such terrorist acts and, therefore, the security and economy of the entire society is jeopardized.

The main dissimilarity between hirabah and modern day terrorism lies in the objectives of the terrorists. Current definitions of terrorism focus mainly on the politically motivated acts of terrorism, while the definitions of classical Muslim jurists focus primarily on stating the criminal acts committed in certain contexts which constitute the crime of hirabah irrespective of the objectives of  


\textsuperscript{40} Al-Dawoody, “War in Islamic Law”, p. 357.
the criminals. In the context of the classical Muslim jurists, the objective of the culprits of hirābah was usually, though not always, pecuniary. Hence, the approach of the classical Muslim jurists in defining this heinous crime is, first, more practical and easier to determine this crime than the modern countless attempts to define what constitutes terrorism – bearing in mind that the world has as yet failed to agree on an accepted definition of it. Second, it shows a greater concern to the harm that befalls the victims and society as a whole regardless of the motivations of the criminals.

Concerning the punishment of the crime of hirābah, at the outset it should be recalled here that, classical Muslim jurists agree that both the perpetrators and victims of this crime must be Muslims or dhimmis. Additionally, in accordance with the Hanafi doctrine of restricting the jurisdiction of Islamic law to the Islamic territories, al-Sarakhsi indicates that for the perpetrators to be punished by the Qurʾān-prescribed hirābah punishments, the crime must take place in the Islamic territories. That is because the Muslim ruler has no jurisdiction over crimes committed outside the territories of his control. Even if such crimes take place in the territories controlled by Muslim rebels/secessionists, the ruler of the Islamic state still cannot inflict the hirābah punishment on the criminals, but it is the duty of the ruler of the rebels/secessionists to inflict this punishment on them.41 Moreover, if a group of Muslims or dhimmis commit this crime against the mustaʿmins (temporary non-Muslim residents of the Islamic state), then the prescribed hirābah punishment will not be inflicted on them, but, al-Sarakhsi adds, they will be held liable for the destruction of the lives and property of their victims and the ruler gives them a discretionary punishment for the intimidation of their victims. However, if the mustaʿmins committed the crime of hirābah inside the Islamic territories, then, according to al-Sarakhsi, the jurists disagree over inflicting the hirābah punishment on them.42

The Qurʾānic text above prescribes four specific punishments for those convicted of the crime of hirābah. But the jurists disagree over the interpretation of the meaning of the preposition aw (or) separating each of these four punishments. On the one hand, the Hanafi, Shafiʿi and Hanbali jurists advocate that this preposition introduces different punishment for each criminal act.

42 Ibid., Vol. 1, p. 1190.
Thus, execution and gibbeting are the punishments of the culprits of *hirâbah* who kill and rob their victims, while execution only is the punishment of those who kill their victims without robbing them. Amputation of the right hand and left foot is the punishment of the culprits of *hirâbah* who only rob their victims. Exile/imprisonment is the punishment of the culprits who merely terrorize their victims without committing any of the above criminal acts. On the other hand, the Mâlikî jurists advocate that this preposition here indicates that the judge has the right to choose the appropriate punishment for each of the culprit of *hirâbah* from these four specific punishments. Apart from cases of murder in which the culprits of *hirâbah* must be executed – as the jurists unanimously agree – the judge may choose to sentence them any of the four punishments depending on what serves the best interest of the society by preventing them from committing this heinous crime again. In other words, if a culprit of *hirâbah* is skilled at planning this crime, he is to be executed, while if he lacks this skill but has the physical strength to commit the crime, then his right hand and left foot are to be amputated. If he does not have both the skill to plan the crime or the bodily strength to commit it, the judge may imprison/exile him. Regarding the punishment of the accomplices in this crime, apart from al-Shâfi‘î, the Hanî, Mâlikî and Hanbîlî jurists advocate that accomplices receive the same punishment as the actual perpetrators of this crime.43

4. Conclusion

Al-Sarakhsi’s monumental *al-Mabsüt* undoubtedly qualifies him as one of the greatest jurists known to history. His treatment of the Islamic law of war reflects the classical Muslim jurists’ genuine concern to strictly regulate the conduct of the Muslims during the various forms of use of force and the specific war contexts of their times. Their principal objectives here are, first, ensuring that Muslims abide by the restraints laid in the Qur’ân and the Prophetic tradition upon jeopardizing the lives of enemy non-combatants and causing unnecessary damage to their property. Second, giving the Muslim authorities in certain cases the right to take the decisions that fulfils the public interest of the Muslim nation, as shown in the examples given above. These two objectives respectively indicate, first, the great impact which the self-imposing nature of Islamic law could have on the Muslims. In other words, the Islamic law of

43 Ibid., Vol. 1, pp. 1191 f.
war could have an immense impact on the peace and security of the world at present, let alone the fact that the followers of the religion of Islam constitute one fifth of the world’s population. Second, the fact that Islamic law ensures the fulfilment of public interest proves the dynamic, pragmatic and changeable nature of Islamic laws.

Al-Sarakhsi and his contribution to the Islamic law of war are the products of both the Islamic legal tradition, on the one hand, and the context of the world they lived in, on the other. Put differently, in formulating the above rulings, al-Sarakhsi follows the peculiar Islamic legal structure in terms of its sources and methodologies and attempts to govern the conduct of the Muslims during a different paradigm of international relations and a different political system in the Muslim world, as well as a completely different primitive warfare context from those of today’s world. In addition to that, the discussion of the above rulings shows that classical Muslim jurists gave contradictory rulings in many cases. Therefore, the first major conclusion of this paper is that a large part of the Islamic rulings regulating the conduct of the Muslims during war must be revisited and re-evaluated in the context of today’s paradigm of international relations and modern warfare. Al-Sarakhsi’s rulings have survived the centuries and will continue to be studied and consulted as a reference for Islamic law on the subject. Therefore, laws inevitably must always be revisited in order to achieve their objectives if they are to be applied in different situations from those of their origin. The rulings advocated by al-Sarakhsi above concerning the permissibility of attacking the human shield and the execution of POWs have been abused by contemporary Muslim terrorists to justify the indiscriminate and unlawful killings of innocent Muslim and no-Muslim civilians.

The second major conclusion of this paper is that the Islamic law of rebellion and the Islamic treatment of the phenomenon of terrorism could contribute to the maintenance of the peace and security of the Muslim world and, therefore, the world at large. The Islamic approach to defining what constitutes terrorism prevents the political misuse of this crime and the severe punishment of the culprits of this crime serves as a deterrent to the criminals. The Islamic law of rebellion developed by classical Muslim jurists of the second/eighth and third/ninth centuries permits the political opponents of the Islamic state to challenge and under certain conditions violently overthrow the Muslim regime. But before resort to force, the law of rebellion obliges the Islamic state to enter
into discussions with the rebels and address their claims and justification for the resort to armed rebellion in order to resolve the conflict peacefully. That is to say that, this seminal framework of addressing the demands of the opposition of the Islamic regime should have been developed into an Islamic mechanism that ensures the peaceful change of regime. It may be argued here that, had the classical Muslim jurists developed an Islamically based law that enforces and regulates the peaceful change of regime — a key to progress and stability of the Muslim countries at present — the world might have by now a greater number of genuine democratic experiences in the Muslim world. In conclusion, the weak contribution of the Muslim world to the human civilization at present is partly the result of the absent role of the Muslim jurists in shaping the present and future of their societies.