

# Combatants, not bandits: the status of rebels in Islamic law

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## Abstract

*The Islamic law on rebellion offers a comprehensive code for regulating the conduct of hostilities in non-international armed conflicts and thus it can be used as a model for improving the contemporary international legal regime. It not only provides an objective criterion for ascertaining existence of armed conflict but also recognizes the combatant status for rebels and the necessary corollaries of their de facto authority in the territory under their control. Thus it helps reduce the sufferings of civilians and ordinary citizens during rebellion and civil wars. At the same time, Islamic law asserts that the territory under the de facto control of the rebels is de jure part of the parent state. It therefore answers the worries of those who fear that the grant of combatant status to rebels might give legitimacy to their struggle.*



The contemporary world faces many armed conflicts, most of which are deemed ‘internal’ – or ‘non-international’. This article attempts to identify some of the important problems in the international legal regime regulating these conflicts and to find solutions to these problems by taking the Islamic law of rebellion as our point of reference.

Islamic international law – or *Siyar* – has been proven to deal with the issue of rebellion, civil wars, and internal conflicts in quite some detail. Every manual of *fiqh* (Islamic law) has a chapter on *Siyar* that contains a section on rebellion (*khuruj/baghy*);<sup>1</sup> some manuals of *fiqh* even have separate chapters on rebellion.<sup>2</sup> The Qur’an, the primary source of Islamic law, provides fundamental

principles not only to regulate warfare in general but also to deal with rebellion and civil wars.<sup>3</sup> The *Sunnah* of the Prophet elaborates these rules<sup>4</sup> and so do the conduct and statement of the pious Caliphs who succeeded the Prophet; these Caliphs, especially ‘Ali, laid down the norms that were accepted by the Muslim jurists who in time developed detailed rules.<sup>5</sup> Islamic history records several instances of rebellion in its early period<sup>6</sup> and that is why the subject has always been an issue of concern for jurists. Furthermore, the jurists were very conscious about the obligations of both factions during rebellion because Islamic law regards both warring factions as Muslims.<sup>7</sup>

The contemporary legal regime dealing with non-international armed conflicts faces three serious problems today. First, states generally do not like to acknowledge the existence of an armed conflict within their boundaries.<sup>8</sup> Even

- 1 Thus, the *Kitab al-Siyar* in the *Kitab al-Asl* of Muhammad b. al-Hasan al-Shaybani contains a section (*Bab*) on *khuruj*. See Majid Khaduri, *The Islamic Law of Nations: Shaybani’s Siyar*, John Hopkins Press, Baltimore, 1966, pp. 230–254. The same is true of other manuals of the Hanafi School.
- 2 This is the case with *al-Kitab al-Umm* of Muhammad b. Idris al-Shafi’i. This encyclopaedic work contains several chapters relating to *siyar*, and one of these chapters is *Kitab Qital Ahl al-Baghy wa Ahl al-Riddah (Al-Kitab al-Umm)*, ed. Ahmad Badr al-Din Hassun, Dar Qutaybah, Beirut, 2003, Vol. 5, pp. 179–242. The later Shafi’i jurists followed this practice. Thus, Abu Ishaq Ibrahim b. ‘Ali al-Shirazi’s *al-Muhaddhdhab* also contains a separate chapter on *baghy* entitled *Kitab Qital Ahl al-Baghy (Al-Muhaddhdhab fi Fiqh al-Imam al-Shafi’i)*, Dar al-Ma’rifah, Beirut, 2003, Vol. 3, pp. 400–423).
- 3 Surat al-Hujurat gives directives for dealing with *baghy*. (49:9–10). Muslim jurists discuss the issues relating to *baghy* while analysing the implications of the religious duty of *al-amr bi ’l-ma’ruf wa al-nahy ‘an al munkar* (enjoining right and forbidding wrong). See, for instance, Abu Bakr al-Jassas, *Ahkam al-Qur’an*, Qadimi Kutubkhana, Karachi, n.d., Vol. 1, pp. 99–101 and Vol. 2, pp. 50–51.
- 4 See, for instance, traditions in the *Kitab al-Imarah* in Muslim b. al-Hajjaj al-Qushayri’s *al-Sahih*.
- 5 The illustrious Hanafi jurist Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, in his analysis of the Islamic law of *baghy*, asserts in many places that “‘Ali is the *imam* in this branch of law’. See Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *al-Mabsut*, ed. Muhammad Hasan Isma’il al-Shafi’i, Dar al-Kutub al-‘Ilmiyyah, Beirut, 1997, Vol. 10, p. 132.
- 6 ‘Uthman, the third caliph, was martyred by rebels in 35 AH (655 CE). ‘Ali had to fight several wars with his opponents among Muslims and was martyred by a rebel in 40 AH (660 CE). His son al-Husayn was martyred by the government troops in Karbala’ in 61 AH (681 CE). There were several other instances of rebellion during the lifetime of the great Muslim jurist and the founder of the Hanafi school of Islamic law, Abu Hanifah al-Nu’man b. Thabit (80–150 AH (699–767 CE)).
- 7 As we shall see later, when non-Muslims take up arms against a Muslim ruler, it is not deemed ‘rebellion’. Rather, the general law of war applies to such a situation. Thus, the rules of rebellion apply only when both the warring factions are Muslims. The Qur’an calls the rebels ‘believers’ (Qur’an, 49:9) and ‘Ali is reported to have said regarding his opponents: ‘These are our brothers who rebelled against us’. From this, the *fuqaha*’ (jurists) derive this fundamental rule of the Islamic law of *baghy*. See Sarakhsi, above note 5, Vol. 10, p. 136.
- 8 Legally speaking, it is true that international humanitarian law (IHL) applies whenever an armed conflict exists *de facto*, even if a party to the conflict does not acknowledge the existence of the conflict. Yet refusal by the state to acknowledge the existence of the armed conflict within its boundaries complicates the application. See for details: International Committee of the Red Cross (ICRC), ‘Improving compliance with international humanitarian law’, background paper prepared for informal high-level expert meeting on current challenges to international humanitarian law, Cambridge, 25–27 June 2004. See also Michelle L. Mack, *Compliance with International Humanitarian Law by Non-state Actors in Non-international Armed Conflicts*, Program on Humanitarian Policy and Conflict Research, Harvard University, Working Paper, 2003, available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-6SYHW3/\\$file/Harvard-Nov2003.pdf?openement](http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-6SYHW3/$file/Harvard-Nov2003.pdf?openement) (last visited 7 February 2011). See also Marco Sassoli, ‘Taking armed groups seriously: ways to improve their compliance with international humanitarian law’, in *International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 5–51.

when they face strong secessionist movements, they tend to call it a 'law and order' problem or an 'internal affair'.<sup>9</sup> Second, it may be difficult to make non-state actors comply with *jus in bello* because international law is generally considered binding on states only.<sup>10</sup> Third, and most importantly, the law does not accord combatant status to insurgents, which is why they are subject to the general criminal law of the state against which they take up arms.

In this study we will analyse the detailed rules of Islamic law regarding the legal status of rebels so as to explore the possible solutions to these problems arising within the contemporary law of armed conflict.

## Defining rebellion

In his landmark study of the Islamic law of rebellion, Khaled Abou El Fadl defines rebellion as 'the act of resisting or defying the authority of those in power'.<sup>11</sup> He says that rebellion can occur either in the form of 'passive non-compliance with the orders of those in power' or in the form of 'armed insurrection'.<sup>12</sup> Regarding the target of a rebellion, Abou El Fadl says that it could be a social or political institution or the religious authority of the '*ulama*' (legal scholars).<sup>13</sup> We may point out here that passive non-compliance to those in power is not rebellion in the legal sense. Similarly, every violent opposition to government or state cannot be called rebellion because the term 'rebellion' connotes a high intensity of violence and defiance of the government. Hence, from the legal perspective, the classification made by Muhammad Hamidullah (d. 2002), a renowned scholar of Islamic international law, seems more relevant.

## The true hallmark of rebellion

Hamidullah says that if opposition to government is directed against certain acts of government officials it is *insurrection*, the punishment for which belongs to the law of the land.<sup>14</sup> He further asserts that if the insurrection is intended to overthrow the legally established government on unjustifiable ground, it is *mutiny*, while if it is

9 There are two major reasons for this. First, states do not want other states and international organizations to interfere in such a situation. Second, states consider insurgents to be criminals and law-breakers. They fear that acknowledging *belligerent* status for insurgents may give some sort of legitimacy to their struggle.

10 As opposed to general international law, IHL binds 'all parties to a conflict', including the non-state actors even if they did not sign the Geneva Conventions or its Additional Protocols. Yet difficulty may arise in making the non-state actors comply with IHL, mainly because they lack ownership of that law.

11 Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2001, p. 4.

12 *Ibid.*

13 *Ibid.*

14 Muhammad Hamidullah, *The Muslim Conduct of State*, Sheikh Muhammad Ashraf, Lahore, 1945, p. 167.

directed against a tyrannical regime on just ground, it is called a *war of deliverance*.<sup>15</sup> In our opinion, the distinction between mutiny and war of deliverance is based on subjective assessment, as one and the same instance of insurrection may be deemed mutiny by some and a war of deliverance by others.<sup>16</sup> Hence, this distinction serves no useful purpose. The point is simply this: that, as opposed to insurrection, the purpose of mutiny or a war of deliverance is not just to get rid of some government officials but to overthrow the government.

Hamidullah mentions the next stages in the violent opposition to government or state under the titles of rebellion and civil war. He says that when insurrection grows more powerful, to the extent of occupying some territory and controlling it in defiance of the home government, it is called *rebellion*, which may convert into *civil war* if the rebellion grows to the proportion of a government equal to the mother government.<sup>17</sup> Occupying a certain territory and controlling it in defiance of the central government is a useful indicator for identifying rebellion, as we shall see later.

## Rebels versus bandits

The early Muslim jurists also gave detailed descriptions of the rulings of Islamic law regarding violent opposition to government. Generally, they used three terms for this purpose: *baghy*, *khuruj*, and *hirabah*.

*Baghy* literally means disturbing the peace and causing transgression (*ta'addi*).<sup>18</sup> In legal parlance, it denotes rebellion against a *just* ruler (*al-imam al-'adl*).<sup>19</sup> The term *khuruj*, literally 'going out', was originally used for rebellion against the fourth caliph, 'Ali, and those rebels were specifically termed *Khawarij* ('those who went out'). Later, however, the term was assigned to rebellions of various leaders among the household (*ahl al-bayt*) of the Prophet against the tyrannical Umayyad and Abbasid rulers.<sup>20</sup> In other words, the term *khuruj* was used for just rebellion against unjust rulers. However, the just and unjust nature of the war is a subjective issue on which opinions may differ. That is why the Muslim jurists developed the code of conduct for rebellion irrespective of whether the rebellion is just or unjust, and it is for this reason that the two terms *khuruj* and *baghy* came to be used interchangeably.<sup>21</sup> The term *hirabah*, on the other hand, is

15 *Ibid.*

16 We may quote Abou El Fadl here: 'The difference ... between an act of sedition and an act of treason will depend on the context and circumstances of such an act, and on the constructed normative values that guide the differentiation. Therefore, often the distinction created between one and the other is quite arbitrary in nature', above note 11, p. 4.

17 M. Hamidullah, above note 14, p. 168.

18 Abu 'l-Fadl Jamal al-Din Muhammad Ibn Manzur, *Lisan al-'Arab*, Dar Bayrut, Beirut, 1968, Vol. 14, p. 78.

19 Muhamamd Amin b. 'Uthman Ibn 'Abidin al-Shami, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, Matba't Mustafa al-Babi al-Halbi, Cairo, n.d., Vol. 3, p. 308.

20 For instance, the revolt of Zayd b. 'Ali, the great grandson of 'Ali, is called *khuruj* not *baghy*.

21 Thus in the chapters on *Siyar* in the Hanafi manuals the section entitled '*Bab al-Khawarij*' mentions the rulings of Islamic law regarding rebellion irrespective of whether the rebellion is just or unjust.

used for a particular form of robbery on which *hadd* punishment is imposed.<sup>22</sup> While any government would generally deem rebels to be bandits and robbers, the Muslim jurists forcefully asserted that rebellion stands distinct from robbery and that, as such, rebels are not governed by the general criminal law of the land<sup>23</sup> even if punitive action could be taken against them for disturbing the peace and taking the law into their own hands.<sup>24</sup>

### *Dar al-baghy*: territory under the control of rebels

Territory under the control of the rebels is called *dar al-baghy* ('territory of rebels') and the Hanafi jurists consider it outside the jurisdiction of the central government of the Islamic state. The territory under the control of the central government is called *dar al-'adl*, an antonym of *dar al-baghy*.<sup>25</sup> As we shall see later, culprits of a wrong committed in *dar al-baghy* cannot be tried in the courts of *dar al-'adl* even if the central government re-establishes its control over *dar al-baghy*.<sup>26</sup> *Dar al-baghy* may conclude treaties with other states as well.<sup>27</sup> Decisions of the courts of *dar al-baghy* are generally not reversed even if the central government recaptures that territory.<sup>28</sup> Taxes are to be paid while crossing the borders of *dar al-'adl* to *dar al-baghy* and vice versa.<sup>29</sup> Thus, for all practical purposes *dar al-baghy* is considered another state.<sup>30</sup> However, as we shall see later, it is given only *de facto*, not *de jure*, recognition.<sup>31</sup>

### How do we identify rebellion?

The concept of rebellion in Islamic law comes under the doctrine of *fasad fi 'l-ard* ('disturbing peace and order in the land').<sup>32</sup> According to Muslim jurists, there

22 'Ala al-Din Abu Bakr Al-Kasani, *Bada'i' al-Sanai'i' fi Tartib al-Shara'i'*, ed. 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud, Dar al-Kutub al-'Ilmiyyah, Beirut, 2003, Vol. 9, p. 360. In Islamic law, *hadd* is a fixed penalty, the enforcement of which is obligatory as a right of God. *Ibid.*, Vol. 9, p. 177.

23 Thus they held that the rules of *hudud* (fixed penalties for specific crimes), *qisas* (equal punishment for culpable homicide and injuries), *diyah* (financial compensation for homicide), *arsh* (financial compensation for injuries), and *daman* (financial compensation for damage to property) are not applicable to rebels. For details, see below, pp. 8–11.

24 That is why the books on Islamic criminal law devote sections to the issue of rebellion.

25 Sarakhsi, above note 5, Vol. 10, p. 130.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 Abu 'l-Hasan 'Ali b. Muhammad al-Mawardi, *al-Ahkam al-Sultaniyah wa 'l-Wilayat al-Diniyyah*, Dar Ibn Qutaybah, Kuwait, 1989, p. 166.

30 M. Hamidullah, above note 14, p. 168.

31 When a government gives *de facto* recognition to another government, it means that the former is acknowledging as a matter of fact that the latter is exercising effective control of a certain territory. This does not necessarily mean that this control is legal. *De facto* recognition is usually given where doubts remain as to the long-term viability of the government. As opposed to this, *de jure* recognition implies accepting the legitimacy of the authority of that government on the territory under its effective control. See Malcolm N. Shaw, *International Law*, Cambridge University Press, Cambridge, 2003, pp. 382–388.

32 *Baghy* on unjust grounds is *fasad* and the duty of enjoining right and forbidding wrong requires Muslims to curb this *fasad*. Similarly, if the ruler is unjust, the duty of enjoining right and forbidding wrong requires Muslims to try to remove him because he indulges in *fasad*. Hence, there is no contradiction;

are various forms of *fasad* and the ruler has been given the authority under the doctrine of *siyasah*<sup>33</sup> for maintenance of peace and order in the society. The two important forms of *fasad* mentioned explicitly in the Qur'an are *hirabah*<sup>34</sup> and *baghy*.<sup>35</sup> In both of these, a strong group of people take up arms in defiance of the law of the land and challenge the writ of the government. However, *hirabah* is dealt with as a crime and the criminal law of the land is applied to the *muharibin*,<sup>36</sup> while *baghy* is governed by the law of war and the *bughah* are dealt with as combatants, even though, under the doctrine of *siyasah*, the government can take punitive action against the rebels for disturbing the peace of the society. This issue will be further elaborated below, after we explain the criterion for identification of rebellion.

The litmus test for determining the existence of *baghy* and for distinguishing it from *hirabah* is whether or not those taking up arms against the government challenge the legitimacy of the government or the system. While *muharibin* do not deny the legitimacy of the government or the system, *bughah* consider themselves to be the upholders of justice and claim that they are striving to replace the existing illegitimate and unjust system with a legitimate and just order. In technical terms, it is said that the *bughah* have *ta'wil* (legal justification for their struggle).

Thus, there are two ingredients of *baghy*:

1. A powerful group establishes its authority over a piece of land in defiance of the government (*mana'ah*, resistance capability); and
2. this group challenges the legitimacy of the government (*ta'wil*).

rather, these are two sides of the same picture. For an elaborate discussion on the Qur'anic doctrine of *fasad fi 'l-ard*, see Abu 'l-A'la Mawdudi, *al-Jihad fi 'l-Islam*, Idara-e-Tarjuman al-Qur'an, Lahore, 1974, pp. 105–117.

33 The famous Hanafi jurist Ibn Nujaym defines *siyasah* as 'the act of the ruler on the basis of *maslahah* (protection of the objectives of the law), even if no specific text [of the Qur'an or the *Sunnah*] can be cited as the source of that act'. Zayn al-'Abidin b. Ibrahim Ibn Nujaym, *al-Bahr al-Ra'iq Sharh Kanz al-Daqa'iq*, Dar al-Ma'rifah, Beirut, n.d., Vol. 5, p. 11. The *fuqaha'* validated various legislative and administrative measures of the ruler on the basis of this doctrine. For instance, the *faramin* of the Mughal emperors or the *qawanin* of the Ottoman sultans were covered by the doctrine of *siyasah*. This authority of the ruler, however, is not absolute. The *fuqaha'* assert that if the ruler uses this authority within the constraints of the general principles of Islamic law, it is *siyasah 'adilah* (good governance) and the directives issued by the ruler under this authority are binding on the subjects. However, if the ruler transgresses these constraints, it amounts to *siyasah zalimah* (bad governance) and such directives of the ruler are invalid. Ibn 'Abidin, above note 19, Vol. 3, p. 162. For details of the doctrine of *siyasah*, see the monumental work of the illustrious Imam Ahmad b. 'Abd al-Halim Ibn Taymiyyah: *al-Siyasah al-Shar'iyyah fi Islah al-Ra'i wa al-Ra'iyyah*, Majma' al-Fiqh al-Islami, Jeddah, n.d.

34 Qur'an, 5:33.

35 *Ibid.*, 48:9–10.

36 The Hanafi jurists generally mention the rules of *hirabah* (robbery) in the chapter on *sariqah* (theft). See, for instance, Sarakhsi, above note 5, Vol. 9, pp. 134 ff. Some of them, however, mention the rules of *hirabah* in a separate chapter. For instance, Kasani first mentions the crimes of *zina* and *qadhif* in the *Kitab al-Hudud* (Kasani, above note 22, Vol. 9, pp. 176–274), after which he mentions the crime of theft in the *Kitab al-Sariqah* (*ibid.*, Vol. 7, pp. 275–359), and then he elaborates the rules of *hirabah* in the *Kitab Qutta' al-Tariq* (*ibid.*, Vol. 7, pp. 360–375). Finally, he begins an elaborate discussion of the law of war in the *Kitab al-Siyar* (*ibid.*, Vol. 7, pp. 376–550), devoting the final section (*fasl*) to the rules of *baghy* (*ibid.*, Vol. 9, pp. 543–550).

Both *muharibin* and *bughah* have enough *mana'ah* but rebels have *ta'wil*, which *muharibin* lack.<sup>37</sup>

## The legal status of rebels in Islamic law: combatants or bandits?

The issue of rebellion attracted serious questions of theology as well as of legality, both of which were very important for Muslim jurists. However, the jurists not only separated the legal issues from those of theology but also separated those of *jus in bello* from those of *jus ad bellum*. Thus, they analysed the questions about the conduct of hostilities during rebellion irrespective of whether the rebellion was just or unjust, that is, without taking sides – an approach adopted by scholars of international humanitarian law (IHL) in the contemporary world.<sup>38</sup>

Before we explain the extent to which the application of criminal law ceases in case of rebellion, it is pertinent to discuss briefly the various categories of crime in Islamic law.

### Categories of crime in Islamic law

As opposed to other legal systems, in which crimes are generally considered violations of the rights of the state, Islamic law divides crimes into four different categories depending on the nature of the right violated:<sup>39</sup>

- a) *Hadd* is a specific crime deemed to be a violation of a right of God;<sup>40</sup>
- b) *Ta'zir* is a violation of the right of an individual;<sup>41</sup>
- c) *Qisas*, including *diyah* and *arsh*, is deemed to be a violation of the mixed right of God and of an individual in which the right of the individual is deemed to predominate;<sup>42</sup> and
- d) *Siyasah* is a violation of the right of the state.<sup>43</sup>

37 Sarakhsi, above note 5, Vol. 10, p. 136. As noted earlier, the question as to who will decide whether the *ta'wil* of these insurgents is valid or not is not the concern of the *fuqaha*. They concentrate only on the code for the conduct of hostilities (*adab al-qital*) in rebellion, irrespective of whether that rebellion is just or not. Thus, Sarakhsi says that, even if the *ta'wil* of the rebels is invalid, it is deemed sufficient to suspend the rules of *qisas*, *diyah*, and *daman*. *Ibid.*

38 In this analysis, I have primarily relied on the exposition of the Hanafi jurists instead of mixing the views of the various schools. This is because the methodology of *talfiq* or 'conflation' – mixing and combining opinions based on different and sometimes conflicting principles – leads to analytical consistency. However, I have added references to the views of other jurists in the footnotes.

39 See Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, Advanced Legal Studies Institute, Islamabad, 1998.

40 The *hadd* of *qadhif* (false imputation of committing illicit sexual intercourse) is deemed a mixed right of God and of the individual but the right of God is deemed predominant. Kasani, above note 22, Vol. 9, p. 250.

41 *Ibid.*, Vol. 9, p. 273.

42 These punishments are the rights of God, and as such the limits of the punishments are deemed 'fixed', but as the right of the individual is predominant the aggrieved individual or his/her legal heirs can pardon, or reach a compromise with, the offender.

43 Ibn 'Abidin, above note 19, Vol. 3, p. 162.

The nature of the rights involved determines the application of various rules and principles of Islamic criminal law. *Hadd* penalties cannot be pardoned by the state because these are deemed to be the rights of God and as such only God can pardon these penalties.<sup>44</sup> Similarly, the state does not have the authority to pardon *ta'zir* punishments, although the aggrieved individual or his legal heirs can pardon, or reach a compromise with, the offender.<sup>45</sup> The same is the case with the *qisas* punishments.<sup>46</sup> One may consider the part of criminal law covering *hadd*, *ta'zir*, and *qisas* and *diyah* as rigid because the state has little role to play in this area. The state can, however, pardon or commute a *siyasa* punishment because it is deemed a right of the state.

As we shall see below, when *mana'ah* is coupled with *ta'wil* – that is, when there is rebellion – the criminal law relating to the first three categories of rights ceases to apply. It is only area relevant to the right of the state (*siyasa*) that remains applicable. Importantly, this part of criminal law is flexible, as the government can pardon or commute the punishments. This becomes the basis for any pronouncement of general amnesty for rebels, as well as for concluding peace settlements with them.

## Suspension of a major part of criminal law during rebellion

Muhammad b. al-Hasan al-Shaybani, the father of Muslim international law, says: 'When rebels repent and accept the writ of the government, they should not be punished for the damage they caused [during rebellion]'.<sup>47</sup> Explaining this ruling, the famous Hanafi jurist Abu Bakr al-Sarakhsi says:

That is to say, they should not be asked to compensate for the damage they caused to the life and property [of the adverse party]. He means to say: when they caused this damage after they had organized their group and had attained *mana'ah*. As for the damage they caused before this, they should be asked to compensate it because [at that stage] the rule was to convince them and to enforce the law on them. Hence, their invalid *ta'wil* would not be deemed sufficient to suspend the rule of compensation before they attained *mana'ah*.<sup>48</sup>

Shaybani himself mentions a similar rule when he says: 'When those who revolt lack *mana'ah*, and only one or two persons from a city challenge the legitimacy of the government and take up arms against it, and afterwards seek *aman* [peace], the whole law will be enforced on them'.<sup>49</sup> Sarakhsi explains this ruling in

44 Kasani, above note 22, Vol. 9, pp. 248–250.

45 *Ibid.*, Vol. 9, pp. 273–274.

46 *Ibid.*

47 Sarakhsi, above note 5, p. 136. The Shafi'i jurist Abu Ishaq al-Shirazi says: 'If a prisoner among the rebels accepts the authority of the government, he shall be released. If he does not accept the authority of the government, he shall be imprisoned till the end of the hostilities after which he shall be released on the condition that he shall not participate in war.' Shirazi, above note 2, Vol. 3, p. 404.

48 Sarakhsi, above note 5, p. 136.

49 *Ibid.*, p. 141. The same is the preferred opinion of the Shafi'i school. Shirazi, above note 2, Vol. 3, p. 406.



these words: ‘because they are like robbers, and we have already explained that when *ta’wil* lacks *mana’ah*, it has no legal effect [it cannot suspend the rule of compensation]’.<sup>50</sup>

Shaybani further states it explicitly that, even if the government and the rebels conclude a peace treaty on the condition that the rebels would not be asked to make compensation for the damage they caused before they attained *mana’ah*, this condition would be invalid and the law would be enforced on them:

If the rebels have caused damage to life and property before they revolted and fought, and after revolting they conclude a peace treaty on the condition that this damage should not be compensated, this condition will be invalid and the rules of *qisas* and of compensation for damage of property will be applied on them.<sup>51</sup>

It does not amount to treachery. Rather, accepting this condition will amount to violating fundamental norms of Islamic law. Hence, this stipulation is deemed *ultra vires* and as such null and void. Sarakhsi elaborates the principle behind this rule in the following words:

because this compensation is binding on them as a right of the individual [whose life or property was damaged] and the ruler does not have the authority to waive the rights of individuals. Hence, the stipulation from their side regarding the suspension of the rule of compensation is invalid and ineffective.<sup>52</sup>

However, as mentioned above, they will not be asked to compensate for the damage they caused after attaining *mana’ah* in the same way as non-Muslim combatants are not asked to compensate for the damage they caused during war even after they embrace Islam.<sup>53</sup> Sarakhsi says:

After they attain *mana’ah*, it becomes practically impossible to enforce the writ of the government on them. Hence, their *ta’wil* – though invalid – should be effective in suspending the rule of compensation from them, like

50 Sarakhsi, above note 5, p. 141.

51 *Ibid.*, p. 138. The Shafi’i jurists have a slightly different approach. Shirazi says: ‘If the rebels or the government forces cause harm to each other’s life and property out of active hostilities (*fi ghayr al-qital*), compensation (*daman*) is obligatory ... If the government forces cause harm to the life and property of the rebels during war, no compensation will follow ... If the rebels cause harm to government forces during war, there are two opinions ... The preferred opinion is that no compensation will follow’. Shirazi, above note 2, Vol. 3, pp. 405–406. This rule is applicable when the rebels have already attained *mana’ah*. If they cause any harm before attaining *mana’ah*, they will be forced to compensate. *Ibid.*, Vol. 3, p. 409. The rule is the same when they have *mana’ah*, but lack *ta’wil*. *Ibid.*

52 Sarakhsi, above note 5, p. 139.

53 Municipal law of a party, including its criminal law, is not applicable to the acts (or omissions) of the combatants of the other party. This is a necessary corollary of acknowledging the combatant status. As Islamic law acknowledges this status for non-Muslims aliens, it also acknowledges its necessary corollary. The rule holds true even if these non-Muslims later embrace Islam because Islamic law does not allow retrospective application of criminal law.

the *ta'wil* of the people of war [non-Muslim combatants] after they embrace Islam.<sup>54</sup>

Sarakhsi also quotes the precedent of the Companions of the Prophet in this regard. Imam Ibn Shihab al-Zuhri reports the verdict that enjoys the consensus of the Companions regarding the time of civil war between Muslims:

At the time of *fitnah* [war between Muslims] a large number of the Companions of the Prophet were present. They laid down by consensus that there is no worldly compensation or punishment for a murder committed on the basis of a *ta'wil* of the Qur'an, for a sexual relationship established on the basis of a *ta'wil* of the Qur'an and for a property damaged on the basis of a *ta'wil* of the Qur'an. And if something survives in their hands, it shall be returned to its real owner.<sup>55</sup>

It must be noted here that the suspension of the criminal law or of the worldly punishment does not imply that the acts of rebels were lawful. Shaybani asserts that if the rebels acknowledge that their *ta'wil* is invalid they would be advised to make compensation for the damage they caused, although legally they cannot be forced to do so. 'I will advise them by way of *fatwa* to compensate for the damage they caused to life and property. But I will not legally force them to do so.'<sup>56</sup> Sarakhsi explains this ruling by saying:

[b]ecause they are believers in Islam and they acknowledge that their *ta'wil* was invalid. However, the authority of enforcing the law on them vanished after they attained *mana'ah*. That is why they will not be legally compelled to compensate the damage, but they should be given *fatwa* because they will be responsible before God for this.<sup>57</sup>

As opposed to rebels, a gang of robbers who possess *mana'ah* but lack *ta'wil* are forced to compensate for the damage and are punished for the illegal acts. Sarakhsi says:

[b]ecause for robbers *mana'ah* exists without *ta'wil*, and we have already explained that the rule is changed for rebels only when *mana'ah* is combined with *ta'wil*, and that the rule of compensating for the damage is not changed when one of these exists without the other.<sup>58</sup>

54 *Ibid.*, p. 136.

55 *Ibid.* Shirazi quotes the same precedent: Shirazi, above note 2, Vol. 3, p. 406. Muwaffaq al-Din Ibn Qudamah al-Maqdisi, the famous Hanbali jurist, says: 'When the rebels can not be controlled except by killing, it is permissible to kill them and there is no liability of sin, compensation or expiation on the one who killed them'. Muwaffaq al-Din Ibn Qudamah al-Maqdisi, *Al-Mughni Sharh Mukhtasar al-Khiraqi*, Maktabat al-Riyad al-Hadithah, Riyadh, 1981, Vol. 8, p. 112. He further says: 'And the rebels also do not have the obligation to compensate for the damage they caused to life and property during war'. *Ibid.*, p. 113.

56 Sarakhsi, above note 5, p. 136.

57 *Ibid.*

58 *Ibid.*, p. 142. We noted above that the position is the same in the Shafi'i school. Shirazi, above note 2, Vol. 3, p. 409.

Thus, Islamic law acknowledges some important rights for those fighting in a civil war or – to use the IHL terminology – non-international armed conflict.<sup>59</sup>

### Distinction between Muslim and non-Muslim rebels: legal implications

The Muslim jurists do not apply the law of *baghy* to rebels when all the rebels are non-Muslims; they apply it only when non-Muslim rebels are joined by Muslim rebels, or when all the rebels are Muslims. When all the rebels are non-Muslims, the jurists apply the general code of war on them,<sup>60</sup> which is applicable to other *ahl al-harb*.<sup>61</sup> The jurists discuss this issue under the concept of termination of the contract of *dhimmah*.<sup>62</sup>

According to Islamic law, a contractual relationship exists between the Muslim government and the non-Muslim residents of *dar al-Islam*. By concluding the contract of *dhimmah*, the Muslim ruler guarantees the protection of life and property as well as freedom of religion to non-Muslims who agree to abide by the law of the land and to pay *jizyah* (poll tax). The jurists hold that the contract of *dhimmah* is terminated only by one of the following two acts: first, when a *dhimmi* becomes permanently settled outside *dar al-Islam*;<sup>63</sup> and second, when a strong group of non-Muslims having enough *mana'ah* rebels against the Muslim government.<sup>64</sup>

Thus, the contract of *dhimmah* is not terminated by any of the following acts:

- refusal to pay *jizyah*;
- passing humiliating remarks against Islam or the Qur'an;
- committing blasphemy against any of the Prophets (peace be upon them);

59 M. Hamidullah, above note 14, pp. 167–168.

60 The general code of war in Islamic law not only distinguishes between lawful and unlawful targets but also puts many restrictions on the means and methods of warfare. These include, *inter alia*, prohibition of attacking non-combatants, prohibition of mutilation, prohibition of wanton destruction, obligation of observing treaty provisions, permissibility of ruses, and prohibition of perfidy. For a detailed comparative study of the Islamic *jus in bello* and the contemporary law of armed conflict, see Muhammad Mushtaq Ahmad, *Jihad, Muzahamat awr Baghawat Islami Shari'at awr Bayn al-Aqwami Qanun ki Roshni mayn*, Shariah Academy, Gujranwala, 2008, pp. 295–478, 583–594, and 631–668. See also Ameer Zemzali (ed.), *Maqalat fi 'l-Qanun al-Dawli al-Insani wa 'l-Islam*, ICRC, Geneva, 2007.

61 Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Sharh al-Siyar al-Kabir*, Dar al-Kutub al-'Ilmiyyah, Beirut, 1997, Vol. 4, p. 164. One may compare it with the notion of international armed conflict in the contemporary international legal order.

62 According to Muslim jurists, the Islamic state has a contractual relationship with non-Muslims residing permanently within its territory. This contract is called '*dhimmah*' (literally, a contract that brings rebuke (*dhamm*) if violated). By virtue of the contract of *dhimmah*, the Islamic state guarantees equal protection of life and property to its non-Muslims citizens. For details, see Kasani, above note 22, Vol. 9, pp. 426–458.

63 In modern parlance, one may say that Islamic law does not acknowledge the concept of 'dual nationality'. It may be noted here that Pakistani law also does not acknowledge this concept. See Section 14 of the Pakistan Citizenship Act, 1951.

64 A third factor is also mentioned, namely, embracing Islam. Kasani, above note 22, Vol. 7, p. 446. However, this, of course, is not a cause for the loss of the right to permanent residence in *dar al-Islam*.

- compelling a Muslim to abandon his religion; or
- committing adultery with a Muslim woman.<sup>65</sup>

The jurists consider these as crimes punishable under the law of the land.<sup>66</sup> Non-Muslims who permanently settle outside *dar al-Islam* are treated like ordinary aliens,<sup>67</sup> while non-Muslim rebels are treated in the same manner as ordinary non-Muslim enemy combatants.<sup>68</sup>

The net conclusion is that both Muslim and non-Muslim rebels are treated as combatants and the law of war in its totality is applied on them. However, if some or all of the rebels are Muslims, the law puts further restrictions on the authority of the government. For instance, Islamic law prohibits targeting women and children both in its general law of war and in its special law of *baghy*,<sup>69</sup> while the rules of *ghanimah* applicable to the property of the enemy are not applicable to the property of the rebels, whether Muslims or non-Muslims.<sup>70</sup>

The combatant status acknowledged by Islamic law for rebels, both Muslims and non-Muslims, offers a great incentive to the rebels to comply with the law of war. Because of this status, the general criminal law of the land is not applied to them. In other words, they can be punished only when they violate the law of war. Furthermore, the additional restrictions regarding Muslim rebels can also be accepted by the international community as general rules applicable to all rebels through an international treaty.<sup>71</sup> Finally, as the Islamic law of *baghy* is part of the divine law, Muslim rebels cannot deny the binding nature of this law and they cannot make the plea that the law has been laid down through treaties to which they are not party.

65 Kamal al-Din Muhammad Ibn al-Humam al-Iskandari, *Fath al-Qadir 'ala 'l-Hidayah*, Dar al-Kutub al-'Arabiyyah, Cairo, n.d., Vol. 4, p. 381. Jurists, other than the Hanafis, hold that the contract of *dhimmah* is terminated by any of these acts, although some of them hold that this is true only when it was mentioned in the contract that these acts must be avoided. Ibn Qudamah, above note 55, Vol. 8, p. 525; Shams al-Din Muhammad b. Muhammad al-Khatib al-Shirbini, *Mughni ila Muhtaj ila Sharh al-Minhaj*, Matba'at al-Halbi, Beirut, 1933, Vol. 4, p. 258.

66 Iskandari, above note 65, Vol. 4, p. 381.

67 Burhan al-Din 'Ali b. Abi Bakr b. 'Abd al-Jalal al-Farghani al-Marghinani, *Al-Hidayah fi Sharh Bidayat al-Mubtadi*, Dar al-Fikr, Beirut, n.d., Vol. 2, p. 405.

68 Shaybani, above note 61, Vol. 4, p. 164; Iskandari, above note 65, Vol. 4, p. 382. It may be noted here that termination of the contract of *dhimmah* by some of the non-Muslims does not affect the legal status of those who did not terminate it. Iskandari, above note 65, Vol. 4, p. 253; Shirbini, above note 65, Vol. 4, p. 258; Ibn Qudamah, above note 55, Vol. 8, p. 524.

69 However, they can be targeted if they directly participate in hostilities.

70 This is the opinion of the *Shafi'i* jurists: Shirazi, above note 2, Vol. 3, pp. 406–407. The Hanafi jurists hold that the additional prohibitory rules of the code of rebellion are only applicable to Muslims rebels: Sarakhsi, above note 5, Vol. 10, p. 137.

71 Islamic law allows a Muslim ruler to conclude treaties with non-Muslims for regulating the conduct of hostilities and for putting restrictions on the authority of the parties to the treaties. Sarakhsi, above note 51, Vol. 1, pp. 210–214.

## Legal implications of the *de facto* authority of rebels

Islamic law recognizes some important legal consequences of the *de facto* authority of rebels. This is advantageous in so far as it provides further incentive to rebels to comply with the law of war. The jurists elaborated in detail various aspects of this *de facto* authority, and we will discuss four important implications here.

### Collection of revenue by rebels

If rebels collect revenue – that is to say *kharaj*, *zakah*, *'ushr*, and *khums*<sup>72</sup> – from people living in the territory under their control, the central government cannot collect that revenue again even if it later resumes control of that territory.<sup>73</sup> The reason mentioned in the famous Hanafi text *al-Hidayah* is that ‘the ruler can collect revenue only when he provides security to his subjects and [in this case] he failed to provide them security’.<sup>74</sup> Here, an important issue is discussed by the jurists. From the perspective of Islamic law, *zakah* and *'ushr* are not only categories of revenue but also acts of worship (*'ibadah*). That is why a question arises as to whether those who have paid *zakah* and *'ushr* to rebels would be *liable before God* to pay it again to the legitimate authority (central government). The answer is that they would be liable before God only if the rebels do not spend this revenue in the heads prescribed by the law.<sup>75</sup>

### Decisions of the courts in *dar al-baghy*

The Muslim jurists discussed various aspects of the authority of the courts in *dar al-baghy*. We will analyse three significant points of this debate. First, is it allowed for a person qualified to be a judge to accept such an appointment under the authority of rebels when this person himself denies the legitimacy of their authority? The answer provided by the jurists is that such a person should accept this

72 *Kharaj* is the term used for the tribute paid by non-Muslims to the Muslim government through a peace settlement. See Muammad Rawwas Qal'aji, *Mu'jam Lughat al-Fuqaha'*, Dar al-Nafa'is lil-Nashr wa al-Tawzi', Beirut, 2006, p. 194. This includes *jizyah* (*ibid.*, p. 164). *Zakah* is the revenue collected from the savings of rich Muslims at the rate of 2.5% per annum. It is also deemed an act of *'ibadah* (ritual worship). *Ibid.*, p. 233. *'Ushr* is a 10% tax levied on the crops of Muslims in un-irrigated land. If the crops are in irrigated land, the rate is 5%, and in that case it is called *nisf al-'ushr* (half of 10%). *Ibid.*, p. 312. *Khums* is the 20% revenue levied on minerals (*ma'adin*) and buried treasures (*kunuz*). *Ibid.*, p. 201.

73 Marghinani, above note 67, Vol. 2, p. 412. Professor Imran Ahsan Khan Nyazee translated the relevant passage of *al-Hidayah* in these words: ‘What the rebels have collected by way of *kharaj* and *'ushr*, from the lands that they came to control, is not to be collected a second time by the *imam*'. *Al-Hidayah: The Guidance*, Amal Press, Bristol, 2008, Vol. 2, p. 343. The Shafi'i jurists have a different approach. They say that *zakah* will not be recollected, while *jizyah* will, and for *kharaj* there are two opinions. Shirazi, above note 2, Vol. 3, p. 407. The same opinion is held by the Hanbali jurists. Ibn Qudamah, above note 55, Vol. 8, pp. 118–119.

74 Marghinani, above note 67, Vol. 2, p. 412.

75 *Ibid.*

post and decide the cases in accordance with the provisions of Islamic law, even if he does not accept the legitimacy of the appointing authority. Shaybani says:

If rebels take control of a city and, from among the people of that city, appoint as a judge someone who does not support them, he shall enforce *hudud* and *qisas* and shall settle the disputes between people in accordance with the norms of justice. He has no other option but to do so.<sup>76</sup>

In this regard, the jurists generally cite the precedent of the famous Qadi Shurayh, who not only accepted appointment as a judge from Caliph ‘Umar b. al-Khattab but also acted as a judge in Kufah during the tyrannical rule of the Umayyad Caliph ‘Abd al-Malik b. Marwan and the governorship of al-Hajjaj b. Yusuf. The illustrious Hanafi jurist Abu Bakr al-Jassas cited this precedent, saying that ‘among the Arabs and even among the clan of Marwan, ‘Abd al-Malik was the worst in oppression, transgression and tyranny and among his governors the worst was al-Hajjaj’.<sup>77</sup>

Another precedent quoted by the jurists is that ‘Umar b. ‘Abd al-‘Aziz (Allah have mercy on him), the famous Umayyad Caliph who tried to restore the system of the *al-Khulafa’ al-Rashidin*, did not reappoint the judges who had been appointed by the preceding Umayyad Caliph, who was considered to be a tyrant. Sarakhsi explains the legal principles underlying this rule in the following way:

Deciding disputes in accordance with the norms of justice and protecting the oppressed from oppression are included in the meaning of ‘enjoining right and forbidding wrong’, which is the obligation of every Muslim. However, for the one who is among the subjects it is not possible to impose his decisions on others. When it became possible for him because of the power of the one who appointed him, he has to decide in accordance with what is obligatory upon him, irrespective of whether the appointing authority is just or unjust. This is because the condition for the validity of appointment is the capability of enforcing decisions, and this condition is fulfilled here.<sup>78</sup>

The second issue is the validity of the decisions of the courts of *dar al-baghy*. The jurists have laid down the fundamental principle that, if a judge of *dar al-baghy* sends his decision to a judge of *dar al-‘adl*, it will not be accepted by the latter.<sup>79</sup> Sarakhsi mentions two reasons for this rule:

1. For the courts of *dar al-‘adl*, rebels are sinners (*fussaq*) and the testimony and decisions of those who commit major sins are unacceptable. In other words,

76 Sarakhsi, above note 5, Vol. 10, p. 138. Ibn Qudamah says: ‘When rebels appoint a judge who is qualified for the post, his legal position is similar to the judge of the central government’. Ibn Qudamah, above note 55, Vol. 8, p. 119.

77 Jassas, above note 3, Vol. 1, p. 99.

78 Sarakhsi, above note 5, Vol. 10, p. 138.

79 *Ibid.*, Vol. 10, p. 142. The Shafi’i jurists hold that it is better for the judge of *ahl al-‘adl* not to accept the decision of the judge of *ahl al-baghy*. However, if he accepts it and decides accordingly, the decision will be enforced. Shirazi, above note 2, Vol. 3, p. 407. The Hanbali jurists take the same position. Ibn Qudamah, above note 55, Vol. 8, p. 120.

the courts of *dar al-baghy* have no legal authority to bind the courts of *dar al-‘adl*.

2. The rebels do not accept the sanctity of the life and property of the people of *dar al-‘adl*. Hence, there is a possibility that the court of *dar al-baghy* may have decided the case on an invalid basis.<sup>80</sup>

However, if the judge of *dar al-‘adl*, after reviewing the decision of the judge of *dar al-baghy*, concludes that the case was decided on valid legal grounds, such as when he knows that the witnesses were not rebels, he would enforce that decision.<sup>81</sup> If it is unknown whether the witnesses were rebels or not, the court of *dar al-‘adl* would still not enforce this decision ‘because for the one who lives under the authority of the rebels, the presumption is that he is also among them. Hence, the judge [of *dar al-‘adl*] will act on this presumption unless the contrary is proved’.<sup>82</sup> The net conclusion is that decisions of the courts of *dar al-baghy* will not be enforced by the courts of *dar al-‘adl* unless, after a thorough review of the decision, the latter conclude that it is valid.

The third issue covers the legal status of the decisions of the courts of *dar al-baghy* after the central government recaptures that territory. Shaybani says:

Rebels take control of a city and appoint a judge there who settles many disputes. Later on, when the central government recaptures that city and the decisions of that judge are challenged before a judge of *ahl al-‘adl*, he will enforce only those decisions which are valid.<sup>83</sup>

If such decisions are valid according to one school of Islamic law and invalid according to another school, they will be deemed valid even if the judge of *ahl al-‘adl* belongs to the school that considers them invalid, ‘because the decision of a judge in contentious cases [where the jurists disagree] is enforced’.<sup>84</sup> It means that only those decisions of the courts of *dar al-baghy* will be invalidated that are against the consensus opinion of the jurists. Moreover, such decisions will be invalidated only when they are challenged by an aggrieved party in the courts of *ahl al-‘adl*. Hence, generally the decisions of the courts of *dar al-baghy* are not reopened.<sup>85</sup>

80 Shirazi says that the decisions of the judge of the rebels will only not be enforced if he does not believe in the sanctity of the life and property of *ahl al-‘adl*. Shirazi, above note 2, Vol. 3, p. 407.

81 Sarakhsi, above note 5, Vol. 10, p. 138.

82 *Ibid.*

83 *Ibid.*, p. 142. The Shafi‘i jurists are of the opinion that decisions of the rebel courts shall not be overturned even after the territory is recaptured by the central government because such decisions are presumed to be based on *ijtihad*. Shirazi, above note 2, Vol. 3, p. 407.

84 Sarakhsi, above note 5, Vol. 10, p. 142. See also Ibn Qudamah, above note 55, Vol. 8, p. 120.

85 This is known as the doctrine of ‘past and closed transactions’. There is an interesting example of this doctrine in Pakistani judicial history when some judges of the Supreme Court ‘rebelled’ against the then chief justice Sajjad Ali Shah. It was finally concluded that, after the so-called *Judges Case (Al-Jehad Trust v. Federation of Pakistan, PLD 1996 SC 324)*, Justice Shah was not qualified to continue as chief justice because he was not the most senior judge of the Supreme Court. However, the cases decided by Justice Shah as ‘*de facto* chief justice’ were not reopened, on the basis of the doctrine of past and closed transactions. *Malik Asad Ali v. Federation of Pakistan*, 1998 SCMR 15; see also Hamid Khan, *Constitutional and Political History of Pakistan*, Oxford University Press, Karachi, 2001, pp. 274–275.

## Treaties of rebels with a foreign power and their legal effects on the supporters of the central government

A peace treaty in Islamic law is deemed to be a category of the larger doctrine of *aman*.<sup>86</sup> One of the fundamental principles of *aman* is that every Muslim has the authority to grant *aman* to an individual or even a group of non-Muslims, provided that the one who grants *aman* forms part of a strong group that possesses *mana'ah*.<sup>87</sup> This *aman* granted by an individual Muslim binds all Muslims.<sup>88</sup> Hence, all Muslims are duty bound to protect the life and liberty of the one to whom an individual Muslim or a group of Muslims has granted *aman*.<sup>89</sup>

On the basis of these principles, the jurists explicitly stated that if rebels conclude a peace treaty with non-Muslims, it will not be permissible for the central government to fight those non-Muslims in violation of that peace treaty.<sup>90</sup> However, if the peace treaty is concluded on the condition that the non-Muslim party will support the rebels in their war against the central government, this treaty will not be deemed a valid *aman* and the non-Muslims will not be considered *musta'minin*. Sarakhsi explains this in the following words:

Because *musta'min* is the one who enters *dar al-Islam* after pledging not to fight Muslims, while these people enter *dar al-Islam* for the very purpose of fighting those Muslims who support the central government. Hence, we know that they are not *musta'minin*. Furthermore, when *musta'minin* [after entering *dar al-Islam*] organize their group in order to fight Muslims and take action against them [Muslims], this is considered a breach of *aman* on their part.

86 Kasani divides *aman* into two basic categories: *aman mu'abbad* (also called *dhimmah*) and *aman mu'aqqat*. see Kasani, above note 22, Vol. 9, p. 411. The former is a treaty of perpetual peace whereby the non-Muslim party agrees to pay *jizyah* to Muslims and is thereby entitled to the right of permanent residence in *dar al-Islam*, with Muslims guaranteeing them the protection of life and liberty. The latter is further divided into *aman ma'ruf* (ordinary *aman*), which is accorded to those who want to enter *dar al-Islam* temporarily, and *muwada'ah* (peace treaty), which is concluded with a foreign group of non-Muslims who are willing to establish a peaceful relationship. *Muwada'ah* may be either time-specific (*mu'aqqatah*) or not (*mutlaqah*). *Ibid.*, Vol. 9, p. 424.

87 That is why a Muslim prisoner in the custody of the enemy or a Muslim trader in a foreign land cannot grant *aman*. Shaybani, above note 51, Vol. 1, p. 213.

88 *Ibid.*, Vol. 1, p. 201.

89 However, a Muslim ruler has the authority to prohibit his subjects from granting *aman* in a particular situation, if someone grants *aman* after this prohibition, it will have no validity. *Ibid.*, Vol. 1, p. 227. Moreover, a Muslim ruler also has the authority to terminate the *aman* granted by one or more of his subjects, but he cannot take any action against those to whom *aman* was granted unless he gives them a notice of the termination of *aman* and provides them with an opportunity to reach a place where they deem themselves safe (*ma'man*). *Ibid.*, Vol. 2, p. 229.

90 Sarakhsi, above note 5, Vol. 10, p. 141. Not only that, but the *fuqaha'* also assert that, even if the rebels seize the property of these *ahl al-muwada'ah*, in violation of the peace treaty, the central government should not buy this property from them. Rather, it should advise the rebels to return the property to the rightful owner. If the rebels surrender, or the government overpowers them, the government will be bound to return the property to the rightful owner. *Ibid.*



Therefore, this intention [to fight Muslims] must invalidate the *aman* from the beginning.<sup>91</sup>

In this passage, it is important to note that Sarakhsi considers the territory of rebels as part of *dar al-Islam* and builds his arguments on this presumption. In other words, although rebels have established their *de facto* authority over this territory, yet in the eyes of the law this is deemed to be part of *dar al-Islam*. We will return to this issue later.

### Attack of a foreign power on rebels and the legal responsibility of the central government

As a general rule, it is not permissible for *ahl al-‘adl* to support rebels in war. Hence, if during a war between *ahl al-‘adl* and rebels a person from among *ahl al-‘adl* is killed while he is on the side of the rebels, neither *qisas* nor *diyah* will be imposed on the one who killed him, as is the case when a person is killed while he is on the side of non-Muslims.<sup>92</sup> However, when rebels are attacked by a foreign power, even the central government is under an obligation to support the rebels.<sup>93</sup> Shaybani says that this obligation is imposed even on those *ahl al-‘adl* who temporarily go to *dar al-baghy*:

The same obligation is imposed on those *ahl al-‘adl* who happened to be in the territory of rebels when it was attacked by the enemy. They have no option but to fight for protecting the rights and honour of Muslims.<sup>94</sup>

Sarakhsi, in his usual authoritative style, explains the principle behind this ruling in these words:

Because the rebels are Muslims, hence fighting in support of them gives respect and power to the religion of Islam. Moreover, by fighting the attackers, they defend Muslims from their enemy. And defending Muslims from their enemy is obligatory on everyone who has the capacity to do so.<sup>95</sup>

In other words, even when two groups of Muslims have a mutual conflict, none of them should seek support of non-Muslims against the other.<sup>96</sup> Their mutual

91 *Ibid.*, Vol. 10, p. 143. The Shafi‘i and Hanbali jurists hold the same view and Shirazi and Ibn Qudamah give the same argument. Shirazi, above note 2, Vol. 3, p. 406; Ibn Qudamah, above note 55, Vol. 8, p. 121. The same principle applies to any treaty of the central government with non-Muslims for military support against Muslim rebels.

92 Sarakhsi, above note 5, Vol. 10, p. 140.

93 The basis for this obligation is that, even after rebellion, the rebels are deemed to be Muslims. *Ibid.*, Vol. 10, p. 107.

94 *Ibid.*

95 *Ibid.*

96 Shirazi, above note 2, Vol. 3, p. 404; Muhammad b. ‘Arafah al-Dasuqi, *Hashiyah ‘ala al-Sharh al-Kabir*, ‘Isa al-Babi, Cairo, 1934, Vol. 4, p. 299; Mansur b. Yunus al-Buhuti, *Kashshaf al-Qina‘ ‘an Matn al-Iqna‘*, Alam al-Kutub, Beirut, 1983, Vol. 6, p. 164.

conflict is thus deemed an ‘internal affair’ of the Muslim community, in which non-Muslims should not interfere.

### *De facto* authority and legitimacy

Does all this mean that Islamic law gives some kind of legitimacy to rebellion? The answer is an emphatic ‘no’! The combatant status, as noted earlier, is given to all those who participate in war, irrespective of whether or not they are on the right side. For instance, the contemporary law of armed conflict applies equally to all parties to a conflict no matter which party has lawfully or unlawfully resorted to force. In international armed conflicts, combatant status is thus granted to all armed forces independently of any *jus ad bellum* argument. Similarly, the Muslim jurists acknowledge combatant status for rebels when their *mana’ah* is coupled with *ta’wil*, irrespective of whether their *ta’wil* is just or unjust.<sup>97</sup> Rather, even when they assert that the *ta’wil* of the rebels is unjust, they acknowledge the combatant status for them if their unjust *ta’wil* is coupled by *mana’ah*.<sup>98</sup>

We also noted that this rule has been established by the consensus of the Companions of the Prophet.<sup>99</sup> Furthermore, we saw that the primary source for the Islamic law of *baghy* is the conduct of ‘Ali, who recognized the combatant status of those who rebelled against him, although the *ta’wil* of these rebels was undoubtedly flawed. The conclusion is that acknowledging the combatant status for the rebels does not give legitimacy to their struggle.

This is further explained by the fact that the jurists deem *dar al-baghy* to be part of *dar al-Islam* even after the rebels establish their *de facto* control over that territory.<sup>100</sup> In other words, the jurists acknowledge the necessary corollaries of the *de facto* authority of the rebels in *dar al-baghy*, yet they do not give *de jure* recognition to this authority.

## Conclusions

The Islamic law on rebellion provides the yardstick of ‘*ta’wil* plus *mana’ah*’ for the identification of the existence of an armed conflict. Moreover, it distinguishes between rebels and an ordinary gang of robbers by recognizing the combatant status for rebels as well as the necessary corollaries of their *de facto* authority in the territory under their control. Thus, it offers incentives to rebels for complying with the law of war, thereby reducing the sufferings of civilians and ordinary citizens

97 Sarakhsi, above note 5, Vol. 10, p. 136.

98 *Ibid.*

99 *Ibid.*

100 According to the Hanafi jurists, if a person seizes the property of another person in one *dar* and takes it to another *dar*, he becomes the owner of that property (*ibid.*, Vol. 10, p. 62). However, if a person takes such property from *dar al-‘adl* to *dar al-baghy*, or vice versa, he does not become the owner thereof, ‘because the *dar* of *ahl al-‘adl* and *ahl al-baghy* is one’ (*ibid.*, Vol. 10, p. 135).

during rebellion and civil wars. At the same time, Islamic law asserts that the territory under the *de facto* control of the rebels is *de jure* part of the parent state. Thus, it answers the worries of those who fear that the grant of combatant status to rebels may give legitimacy to their struggle. Unlike the contemporary law of armed conflict, which for the most part has been laid down through treaties to which the rebels are not a party, the Islamic law on rebellion forms an integral part of the divine law and, as such, is binding on all rebels who claim to be Muslims.

Even non-Muslims can seek guidance from this law. If all rebels are non-Muslims, they are not treated like rebels but like ordinary enemy combatants. By virtue of the combatant status, the operation of the general criminal law of the land ceases, even though the government can take punitive action against the rebels for disturbing the peace. This is a solution to the problems faced by the contemporary law of armed conflict.

Islamic law acknowledges certain important legal consequences of the *de facto* authority of the combatants, both Muslims and non-Muslims, in the territory under their control. This offers another incentive for compliance with the law of war.

When non-Muslims are joined by Muslims, or when all rebels are Muslims, Islamic law puts some *additional* restrictions on the authority of the state. It is only this last point on which Islamic law distinguishes between Muslim and non-Muslim rebels. The reason is obvious. Islamic law talks in terms of Muslim and non-Muslim, while the contemporary law of armed conflict distinguishes between nationals and non-nationals. This is a difference that is found in the very nature of the two systems. However, these additional restrictions can be made applicable to all rebels, both Muslims and non-Muslims, by concluding treaties, since Islamic law acknowledges the validity of treaties for regulating the conduct of hostilities.