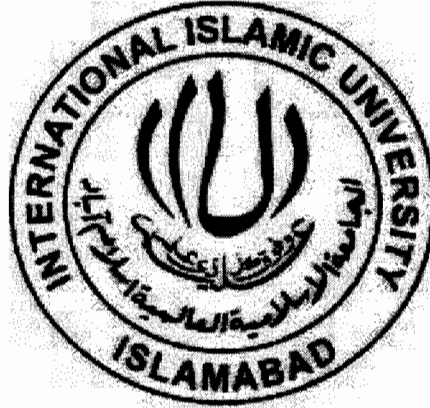


**THE CONDUCT OF HOSTILITIES IN NON-INTERNATIONAL ARMED CONFLICT:
A COMPARATIVE STUDY OF INTERNATIONAL HUMANITARIAN LAW AND
ISLAMIC LAW**



**A DISSERTATION SUBMITTED TO THE DEPARTMENT OF LAW,
INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD IN PARTIAL
FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS (LL.M INTERNATIONAL LAW)**

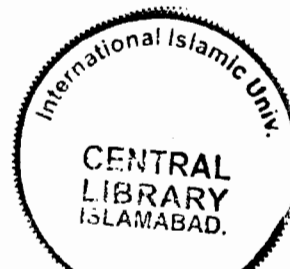
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ASSISTANT PROFESSOR OF LAW**

AT

**THE FACULTY OF SHARI'AH AND LAW
INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD**

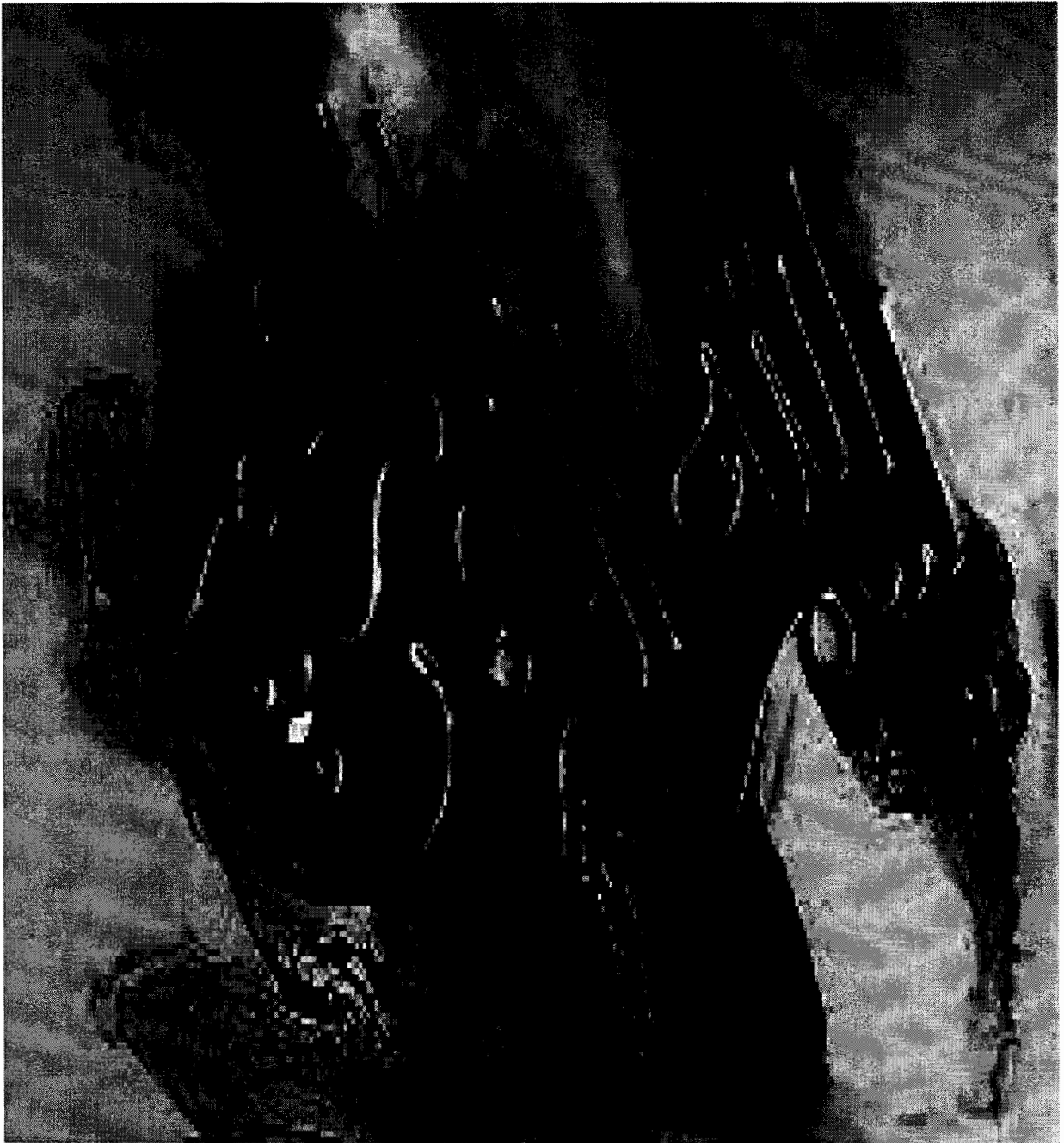
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Humanitarian Law in Armed Conflict



Same Ur Rahman

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A COMPARATIVE STUDY OF INTERNATIONAL HUMANITARIAN LAW AND ISLAMIC LAW**

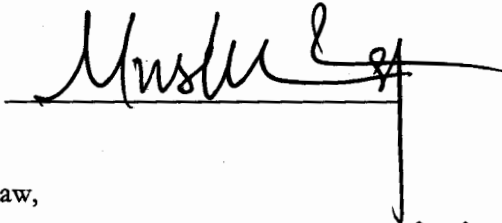
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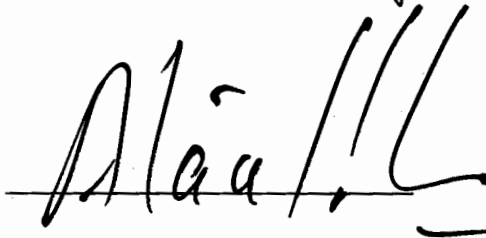
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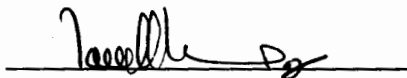
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Declaration

I, Same Ur Rahman, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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Signature: -----

Date: -----

FOR
MY BELOVED GRAND FATHER
(HAKIM MOLVI KABAL JAN, LATE)

MY PARENTS
HAKIM OBAID UR RAHMAN & SAIRA BEGUM

MY UNCLE
SAEED UR RAHMAN

AND MY SON
MUHAMMAD UKASHA RAHMAN

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ACRONYMS

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
CAT	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") of 10 December 1984.
GC I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949
GC II	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.
GC III	Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
HR II	Hague Regulations Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.
HR IV	Hague Regulations (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.
ICJ	The International Court of Justice
ICRC	The International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia

IHL	International Humanitarian Law
IHRL	International Human Rights Law
LOAC	The Law of Armed Conflict
NATO	The North Atlantic Treaty Organization
NIAC	Non-international Armed Conflict
POW	Prisoner of War
UCMJ	The Uniform Code of Military Justice

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Praise be to Allah, the Sustainer of the worlds, the Merciful, the Compassionate! And may His everlasting blessings and peace be on Muhammad, the last of His Messengers!

I could not have accomplished the task of writing this thesis without the help and support of my teachers, family members and colleagues.

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ABSTRACT

The international law of armed conflict has primarily been derived from international treaties and custom which is why its main focus is on international armed conflicts. The branch of law that deals with non-international armed conflicts needs improvement and expansion. This thesis identifies three major lacunae in the contemporary legal regime, namely, lack of an objective criterion for ascertaining the existence of armed conflict and distinguishing it from ordinary problems of law and order; application of the domestic criminal law on those who take up arms against the state and denial of the combatant status for them; and difficulty in ensuring compliance with the law of armed conflict from armed non-state actors who deny ownership of the law. Islamic law has dealt with in detail with all these issues and offers practicable and viable solutions for these problems. Thus, it gives the objective criterion of *mana'ab* (resisting capability) plus *ta'wil* for ascertaining the existence or non-existence of armed conflict. It also acknowledges combatant status for a group which has *mana'ab* and *ta'wil* and suspends the application of the general criminal law of the land on them. Finally, being a divine law it is equally binding on the government forces and rebels, if they are Muslims. Even non-Muslims can be benefited from it because Islamic law offers many incentives to armed non-state actors, such as acknowledging many legal consequences of their *de facto* authority in the territory under their control. At the same time, it answers the concerns of the states by refusing to acknowledge or deny legitimacy of the armed struggle against the state. Hence, Islamic law on rebellion can be used as a model for improving the contemporary international legal regime on non-international armed conflicts and, thus, reducing the sufferings of civilians in such conflicts.

INTRODUCTION

The contemporary international legal regime does not give a comprehensive and effective mechanism for regulating the conduct of hostilities in non-international armed conflict (NIAC). Hence, it faces serious problems in making *non-state actors* comply with the rules. The basic contention of the present thesis is that Islamic law has given an effective and comprehensive code for this purpose, which can be used as a *model* for an *International Convention* on the conduct of hostilities in NIAC.

Statement of the Problem

International humanitarian law (IHL) deals with the conduct of hostilities during an armed conflict, whether of international or non-international character. The basic theme of IHL is to reduce the sufferings and casualties during armed conflicts. Like other branches of international law, most of the rules of IHL have been derived from two sources, namely treaty and custom. Formerly, the bulk of the law was based on custom, which later was codified in the form of treaties. Some of the treaty rules may also have converted to custom. Hence, sometimes there is overlapping between customary and treaty rules. Apart from the treaty law and customary law, there are some general principles of law applicable to every kind of conflict situation, be it international or non-international.

Since the Hague Regulations 1899, the primary concern of IHL has been to regulate the conduct of hostilities in international armed conflicts (IAC).¹ Hence, we find that the four Geneva Conventions of 1949 relate to IAC and only one Article in these four Conventions, Common Article 3, relates "conflicts not of an international character", or simply NIAC.² It was only in 1977 that a treaty – Protocol II Additional to the Geneva Conventions – was concluded for the protection of civilians in NIAC. Unlike the Geneva Conventions, which have universal

¹ Hague Regulations of 1899.

² Art. 3, Common to the four Geneva Conventions.

acceptance, the Additional Protocol II has not been ratified by many countries. Moreover, the contemporary international legal regime lacks detailed rules on many aspects of NIAC.

Literature Review

Despite the importance and significance of the topic, scholars have not paid it the attention it rightfully deserves.

Al-Jihad fi al-Islam of Sayyid Abu al-A'la Mawdudi (d. 1979)³ is deemed a classic on the Islamic law of war. He divides jihad into two categories of defensive (*mudafi'annah*) and corrective (*muslihanah*)⁴ and includes the war against rebels in defensive wars.⁵ However, he also places the law enforcing actions against criminals and bandits in the same category,⁶ which leads to confusion about the spheres of criminal law and the law of war.⁷

The Muslim Conduct of State by Muhammad Hamidullah (d. 2002)⁸ is another important work on the issue. He divides the book into four parts⁹. Third part deals with lawful wars.¹⁰ Among these lawful wars, he mentions civil wars.¹¹ He distinguishes between war against rebels and action against criminals.¹² However, his primary focus is on issues of *jus ad bellum*.

Athar al-Harb fi al-Fiqh al-Islami: Dirassa Muqariyah by Wahbah al-Zuhayli (b. 1933)¹³ is also an important work on the issue. However, the learned author does not take up the issue of rebellion and civil wars and concentrates specifically on wars against non-Muslims.

³ Abu al-A'la Mawdudi, *Al-Jihad fi al-Islam*, (Lahore: Idara Tarjuman ul Quran Pvt Limited, Urdu Bazar) 2011.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Muhammad Hamidullah, *The Muslim Conduct of State*, (Lahore: Shaikh Muhammad Ashraf Publishers, Booksellers & Exporters) 1996.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Wahbah al-Zuhayli, *Athar al-Harb fi al-Fiqh al-Islami*, (Beirut: Dar al-Fikr) 1965.

Rebellion and Violence in Islamic Law by Khaled Abou El Fadl (b. 1963)¹⁴ directly addresses the issue of rebellion. However, the focus of the author is on issues of *jus ad bellum* and not on *jus in bello*.

Fiqh al-Jihad by Yusuf al-Qaradawi (b. 1926)¹⁵ is a recent important work by a learned scholar. This voluminous work gives too many details of the Islamic *jus ad bellum* and as well as *jus in bello*.¹⁶ However, when it comes to rebellion and civil wars, the primary focus of the author is on issues of *jus ad bellum*,¹⁷ not *jus in bello*.

Jihad, Muḏāḡamat aur Baghawāt by Muhammad Mushtaq Ahmad (b. 1976),¹⁸ is an important work in Urdu. The author divides the book into five parts.¹⁹ The last part of the book deals with the issues of civil wars and rebellion. Unlike the other scholars, the author here gives details of *jus ad bellum* as well *jus in bello* and also refers to the relevant provisions of international law. I have benefited from this book.

"Improving compliance with international humanitarian law, The ICRC Background Paper"²⁰ was presented to the high-level expert meeting in Cambridge. This paper focuses on the issues of non-compliance of non-state actors for humanitarian rules, but it did not throw light on how to tackle it and how the ICRC can be successful in making these actors comply with the rules.

"Taking Armed Groups Seriously: Ways to improve their compliance with International Humanitarian Law", by Marco Sassoli (b. 1958),²¹ is an important and relevant recent work by a well-known Professor. He has given some valuable suggestions for the compliance of *non-state*

¹⁴ Khaled Abou El Fadl, *Rebellion & Violence in Islamic Law*, (New York: Cambridge University Press) 2001.

¹⁵ Yousuf al-Qaradawi, *Fiqh al-Jihad*, (Cairo: Maktabah al-Wahabiah) 2009

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Muhammad Mushtaq Ahmad, *Jihad, Muḏāḡimat aur Baghawāt*, (Gujranwala: Al-Shariah Academy) 2008.

¹⁹ *Ibid.*

²⁰ Improving compliance with international humanitarian law, International Humanitarian Law Research Initiative, Background paper prepared for informal high-level expert meeting on current challenges to international humanitarian law, Cambridge, June 25-27, 2004, by the International Committee of the Red Cross.

²¹ Marco Sassoli, "Taking Armed Groups Seriously: Ways to improve their compliance with International Humanitarian Law", *International Humanitarian Legal Studies*, 1 (2010), 5-51.

actors with the rules of humanitarian law. I have benefited from this outstanding work of Marco Sassoli.

"Combatants, Not Bandits: The Status of Rebels in Islamic Law" by Sadia Tabassum²² is a recent work by a young scholar on the issue. She gives interesting details of the Islamic *jus in bello* regarding rebellion, but primarily concentrates on the "status" of rebels. This article greatly helped me in the last chapter of the thesis.

Outline of the Thesis

The thesis comprises of three chapters. In the first chapter, the concept of "non-international armed conflict" has been analysed and the law applicable to such conflicts has been identified. In the second chapter, the general rules of the Islamic law of armed conflict have been explained. These general rules are applicable to every kind of armed conflict. This chapter paves the way for the third chapter, which gives details of the Islamic law of armed conflict that specifically applies to civil wars and rebellions. Finally, the conclusions of the thesis have been recorded in a precise legal language.

²² Sadia Tabassum, Combatants not bandits: the status of rebels in Islamic law, *International Review of the Red Cross*, 93:881 (2011), 121-139.

CHAPTER ONE:

"CONFLICTS NOT OF AN INTERNATIONAL CHARACTER" AND THE APPLICABLE LAW

International humanitarian law recognizes two categories of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC).²³ IAC signifies a conflict between two or more states or between state and a recognized liberation struggle, while NIAC is a conflict between the armed forces of the government of a state and an organized armed group or between such groups within such state.²⁴

We will first briefly explain the concept of international armed conflict, after which we will give details about non-international armed conflicts.

1.1 International Armed Conflicts

Article 2 common to the four Geneva Conventions explicitly asserts that the Conventions are applicable to "declared" wars.²⁵ It further asserts that the Conventions would apply to partial or total occupation of the territory of a state by another state.²⁶ Finally, the Article asserts the applicability of the Conventions to "armed conflicts" between states.²⁷

The term "armed conflict" is wider than "war". Article 1 of the Kellogg-Briand Pact 1928 prohibited war but not "force short of war".²⁸ Article 2 (4) of the UN Charter 1945 widened the

²³ Hans-Peter Gasser, *Introduction to International Humanitarian Law* (Haupt: Henery Dunant Institute, 1993), 4-8.

²⁴ Commentary, Article 2, common to the four Geneva Conventions 1949.

²⁵ Even if one or more parties to the conflict do not acknowledge the state of war. Article 18, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954.

²⁶ Article 2, common to the four Geneva Conventions 1949.

²⁷ *Ibid.*

²⁸ Muhammad Mushtaq Ahmad, The Scope of Self-defence: A Comparative Study of Islamic and Modern International Law, *Islamic Studies*, 49:2, (2010), 155-194.

scope of this prohibition by putting a general ban not only war but also on the threat or use of force.²⁹ About the difference in the scope of war and armed conflict, *The ICRC Commentary* says:

The fact remains that thus far, the qualification of a situation as an armed conflict has largely been left to the discretion and the good faith of the parties concerned and to their perceived interest in respecting their treaty obligations. Yet the objective formula accepted in 1949 represent a significant improvement over the previous situation, in that it provides third parties – such as states not involved in the conflict, organs of the United Nations and, in practice, first and foremost the ICRC – with a tool for exerting pressure on the parties to apply the treaties.³⁰

The UN Charter allows the use of force in self-defense as well as when authorized by the UN Security Council.³¹ The Geneva Conventions remain applicable to such *lawful* uses of force.³²

The First Additional Protocol of 1977 added "recognized liberation struggle" to the category of international armed conflicts.³³ Such a struggle may be started by the people of an occupied territory or by people within a state who want to separate from the parent state. The former is undoubtedly an international conflict, while the latter is deemed non-international by the parent state. Hence, it becomes more relevant to our thesis.³⁴

²⁹ *Ibid.*

³⁰ Frits Kalshoven, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2001), 39

³¹ See Chapter VII of the Charter (Articles 39-51).

³² "A state which uses arms to commit a hostile act against another state can always maintain that it is not making war, but merely engaging in a police action, or acting in a legitimate self-defense. The expression "armed conflict" makes such argument less easy. Any difference arising between two states and leading to the intervention of the armed forces is an armed conflict within the meaning of Article 2 [of the Geneva Conventions], even if one of the parties denies the existence of a state of war." Jean S. Pictet et al (eds.), *Commentary on the Geneva Convention IV* (Geneva: International Committee of the Red Cross, 1958), 20.

³³ "The situations referred to in the preceding paragraph including armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, and enshrined in the Charter of the United Nations and declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations." AP I, Article 1(4).

³⁴ See for details on the legality of armed liberation struggle: Mushtaq: The Scope of Self-defence: A Comparative Study of Islamic and Modern International Law, *Islamic Studies*, 49:2, (2010), 155-194.

1.2 Non-International Armed Conflicts

Now, we will turn to conflicts "not of international character". The law does not define this term. However, if an armed conflict is there and it is "not of international character", it is a non-international armed conflict. This negative definition does not prove helpful in many cases which is why the ICRC and other organizations use many "indicators" to ascertain the existence or non-existence of such a conflict.

1.2.1 Indicators of Non-international Armed Conflict

The main problem here is to ascertain when does a simple law and order problem converts into an "armed conflict". The official authorities generally deny the existence of an armed conflict even if it deploys armed forces and there large-scale fighting between these forces and an armed group. However, the ICRC as well as other organizations and states use certain indicators to answer this question objectively. These indicators include, *inter alia*:

1. that instead of police and other law enforcing agencies, armed forces come to the forefront and they use military force against the group;
2. that the resistance group is has established its effective control on a territory and defies the writ of the official government;
3. that the official government of the state has formally declared war, or acknowledged the status of belligerents for the group, or asked the UN Security Council to take up the issue.³⁵

³⁵ Jean S. Pictet et al (eds.), *Commentary on the Geneva Convention I* (Geneva: International Committee of the Red Cross, 1952), 49-50

1.2.2 State of Belligerency

Sometimes other states feel compelled to recognize the “state of belligerency” in a state which is fighting an armed group within its boundaries, although other states are prohibited from interfering in civil wars.³⁶

The Regulations for Civil War 1900 prepared by the Institute of International Law declare that a warring faction must not be given the status of belligerents unless it fulfill three conditions:

1. occupation of a piece of land;
2. establishment effective control over that territory in defiance of the official government;
3. organized and well disciplined forces under a responsible command.³⁷

We will conclude by quoting the *ICRC Commentary* on the Geneva Conventions, which summarizes this discussion by asserting that conflicts not of an international character are “in many respects similar to an international war, but take place within the confines of a single country.”³⁸

1.3 The Law Applicable to Non-International Armed Conflicts

As noted earlier, IHL is applicable to armed conflicts only. Hence, if the problem is deemed a general law and order problems, only domestic law would be applied to it and IHL would be

³⁶ *Ibid.* See also: Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols* (Geneva: International Committee of the Red Cross, 1987), 1320-22. For instance, if nationals of a state fall into the hands of a warring faction, it will generally ask the government of that state to take necessary steps for their protection and release. If that warring faction has not occupied a piece of land and is considered an ordinary gang of law breakers foreign states generally do not negotiate with it. However, if the situation is more serious and the group is absolutely out of control of the government, other states may feel compelled for its own interests to hold direct negotiations with that group. Thus, it acknowledges ‘the state of belligerency’ in that state.

³⁷ Article 8, *Regulations for Civil War 1900*. See for further details: *Commentary on the Additional Protocols*, 1320-22.

³⁸ *Commentary on Geneva Convention IV*, 36.

irrelevant. Moreover, international human rights law (IHRL) remains applicable to such situations.

If the problem aggravates and converts into an armed conflict, IHL becomes relevant. However, it is not the whole of IHL but only some part of it, which is applicable to such a situation. Thus, among the four bulky Geneva Conventions, it is only one article – common Article 3 –, which is applicable to non-international armed conflicts. The Second Additional Protocol of 1977 will also be applicable if the state facing the NIAC has ratified it.³⁹ Moreover, some rules of customary international law are also applicable. Then, there are some general principles of law which are applicable to all armed conflicts, be international or non-international. Some details of each of these are given below.

1.3.1 Article 3 Common to the Four Geneva Conventions

Common article 3 to the four Geneva Conventions is applicable to the NIAC. Some important rules are discussed in this article. Before adopting AP-II, this was the only article dealing with NIAC. The article asserts that the states parties to the GCs will be bound to apply the provisions of the convention, as it states:

"Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: "⁴⁰

This Common Article, known as mini convention, has laid down some fundamental principles, which all parties are bound to oblige. The article says:

³⁹ Unlike the Geneva Conventions, many states including Pakistan have not yet ratified the Second Protocol.

⁴⁰ Art 3, Common to the Geneva Conventions of 1949.

"(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."⁴¹

It explicitly mentions that the acts listed in this Article "are and shall remain prohibited at any time and in any place whatsoever." The *ICRC Commentary* on this portion of the Article says:

The value of the provision is not limited to the field dealt with in Article 3, representing as it does, the minimum which must be applied in the least determinate of conflicts, its term must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Conventions are applicable. For "the greater obligation includes the lesser" as one might say.⁴²

The Article itself explains the prohibited acts and describes it in a list, those acts are the following:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The Article further lays down the obligation of care for the wounded and sick.⁴³ The rules prescribed in the above article are binding on states as all the states have signed the Geneva Conventions, so the internal armed conflict is to be regulated by these rules. However, the

⁴¹ *Ibid.*

⁴² Commentary to Geneva Convention IV, 38.

⁴³ Article 3, Common to the four Geneva Conventions of 1949.

question arises about the belligerents, whether they are bound by these rules or not when they are not signatories to these conventions?

In this case, there are two main issues, which need to be identified:

1. It is very necessary and helpful for the belligerents to act upon these rules, as if, they do not obey these rules they will prove themselves that they are cruel and terrorists.
2. As the belligerents themselves belong to that state, even if they wish to get freedom from that state and establish their own state, they are obliged to obey these conventions to which that state is signatory. However, they are bound by these treaties until they announce that they are not obliged by that treaty or convention any more.

However, the rules prescribed in Common Article 3, are the rules of customary law and accepted as the general principles of IHL, therefore, to obey these rules are binding on the group of belligerents even if they are not the signatories to the treaty or convention.⁴⁴

1.3.2 Customary International Humanitarian Law

The laws of war came into being since time immemorial, when armed troops have started confronting each other. These rules have been accepted as it was according to nature of the human beings. All the nations of the world have tried their best to limit the damages to be occurred during these confrontations. The state practices of these rules helped giving a shape to these rules and these rules emerged as customary rules for regulating the conduct of confrontations. Some of the very basic and essential rules are mentioned here from the study,

⁴⁴ Andrew Clapham; *Human Rights Obligations of Non-state Actors in Conflict Situations*, International Review of the Red Cross, Vol. 88, No. 863 (September 2006), 491-523.

which the International Committee of the Red Cross, ICRC, carried out for customary international humanitarian law.⁴⁵

Some of the important customary rules are:

1. Civilian and *hors de combat* must be treated humanely.⁴⁶
2. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.⁴⁷
3. Rape and other forms of sexual violence are prohibited.⁴⁸
4. Enforced disappearance is prohibited.⁴⁹
5. Arbitrary deprivation of liberty is prohibited.⁵⁰
6. No one may be convicted or sentenced, except pursuant to a fair trial affording all necessary judicial guarantees.⁵¹
7. The convictions and religious practices of civilians and persons *hors de combat* must be respected.⁵²
8. Mutilation, medical or scientific experiments or any other procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.⁵³
9. Uncompensated or abusive forced labour is prohibited.⁵⁴
10. The taking of hostage is prohibited.⁵⁵

⁴⁵ Foreword by Jacob Kallenger, President of the ICRC for the study on *Customary International Humanitarian Law*. (Cambridge University Press, 2005).

⁴⁶ International Committee of the Red Cross has collected the customary rules of IHL after a strong effort: Jean-Marie and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol: 1, Rules, (Cambridge University Press, 2005), Rule 87, p 306.

⁴⁷ *Ibid*, Rule 90, p 315.

⁴⁸ *Ibid*, Rule 93, p 323.

⁴⁹ *Ibid*, Rule 98, p 340.

⁵⁰ *Ibid*, Rule 99, p 344.

⁵¹ *Ibid*, Rule 100, p 352.

⁵² *Ibid*, Rule 104, p 375.

⁵³ *Ibid*, Rule 92, p 320.

⁵⁴ *Ibid*, Rule 95, p 330.

⁵⁵ *Ibid*, Rule 96, p 334.

11. The use of human shields is prohibited.⁵⁶

12. Collective punishments are prohibited.⁵⁷

1.3.3 Fundamental Guarantees as Mentioned in the First Additional Protocol

Some fundamental rules of customary IHL are applicable in any kind of armed conflicts and it do not distinguish between combatants and non-combatants, this bulk of law is applicable to every one. These rules are known as "Fundamental Guarantees" and are mentioned in Article 75 of the First Additional Protocol. These also form part of customary law and as such are binding on those states who have not yet ratified the Protocol. Most of these guarantees have also been mentioned in Common Article 3, as explained above. It seems pertinent to note that these guarantees are laid down for those "who do not benefit from more favorable treatment under the Conventions or under this Protocol", the non-state actors in the conflicts not of an international character. Like Common Article 3, this Article also declares that the provisions contained therein shall be applied "as a minimum".⁵⁸

Some of these guarantees are:

1. An accused shall guaranteed all necessary rights and means of defense;
2. A person can be convicted only on the basis of individual criminal responsibility;
Retrospective application of criminal law is prohibited;
3. An accused is presumed innocent until proved guilty according to law;
4. Anyone charged with an offence shall have the right to be tried in his presence;
No one shall be compelled to testify against himself or to confess guilt;
Anyone charged with an offence shall have the right to examine the witnesses against him

⁵⁶ *Ibid*, Rule 97, p 337.

⁵⁷ *Ibid*, Rule 103, p 374.

⁵⁸ Art 75, Additional Protocol I, 1977.

and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.⁵⁹

1.3.4 General Principles of International Humanitarian Law

The general principles of IHL, which are applicable in international armed conflict, are equally applicable in non international armed conflict. For the sake of example, targeting civilians is prohibited in any case, whether the conflict is internal or international. Similarly, targeting those soldiers who are no longer taking part in hostilities, or those who are *hors de combat*, or wounded and sick soldiers-to kill them or target them is prohibited in both type of conflicts. It is the case with the principle of individual criminal responsibility. Commander and his sub-ordinates are responsible for their individual acts. A soldier or sub-ordinate cannot argue that he targeted the civilian or civilians, as his commander ordered him to do so. Similarly, a commander would be held responsible for the acts of his sub-ordinates in internal conflicts, as he is responsible in international conflicts. Similar is the case of other fundamental principles of IHL.

Limitation: This principle is stated classically in Article 22 of the Hague Regulations,⁶⁰ and is now restated in Article 35(1) of Additional Protocol I, 'The right of belligerents to adopt means of injuring the enemy is not unlimited'.⁶¹ This principle rejects the idea of total war: not all means that are useful in achieving the end of winning the war are allowed. It makes clear that limitations may be placed on the means and methods of warfare. Hence, for example, certain weapons, such as poisoned weapons, or weapons causing 'unnecessary suffering', are prohibited. This principle dominates the 'Hague Law', and can be seen as the bedrock upon which this branch of the law rests.⁶²

⁵⁹ *Ibid.*

⁶⁰ For details, see Art 22, HR.

⁶¹ For details, read Art 35(1) of AP I.

⁶² Hans-Peter Gasser, *Introduction to International Humanitarian Law* (Haupt: Henery Dunant Institute) 1993.

Military necessity: This principle allows the proportionate use of force to make an enemy submit, but it does not allow you to exterminate the enemy forces. This principle cannot be used as an excuse for inhumane conduct with the enemy. It also does not justify acts prohibited by the LoAC, rather it has been governed by several constraints: like, an attack or action must be intended to help in the military defeat of the enemy, it must be an attack on a military objective, and the harm caused to civilians or civilian property must be proportional and not excessive in relation to the concrete and direct military advantage anticipated.

Proportionality: Proportionality is a third fundamental principle of the LOAC. All military measures taken by belligerents must be proportionate to the aim they seek to accomplish. Proportionality, in the LOAC context, means that the military advantage obtained by a particular operation must outweigh the damage caused to civilians and civilian objects by that action. When planning an operation, each belligerent must carefully weigh up the importance of the military advantage, alternative means by which the advantage may be achieved and the expected losses on the part of the civilians. The importance of the military advantage and the civilian losses must be put into some form of balance and weighed up one against the other. Hence, for example, if it appears that an excessive number of civilians may be killed by an attack when compared to the relative importance of the advantage looked for, the attack will be prohibited. In such a case, it can be said that this attack would cause disproportionate damage to the civilian population.⁶³

Distinction: Parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack Attacks shall be directed solely against military objectives.⁶⁴

Humanity: This principle, which has already been discussed as an important component in the balancing act that underlies IHL, permeates the whole of the so-called 'Geneva Law'. At base, the principle requires that those who do not take part in the armed conflict, so-called

⁶³ *Ibid.*

⁶⁴ *Ibid.*

protected persons, should be treated humanely. This principle is most clearly expressed in common Article 3 to Geneva Conventions and Article 4 of the Second Additional Protocol. Moreover, this principle provides the foundation for all of the detailed rules that are contained in the Geneva Conventions, which in effect attempt to apply the requirement of humane treatment to specific contexts and set out the operation of the obligation in more specific terms.⁶⁵

This fundamental principle forbids the infliction of suffering, injury or destruction not actually necessary for legitimate military purposes. This is also applicable to military purposes and choice of weapons – cannot use weapons which cause unnecessary suffering or superfluous injury. This is very important that when a commander applies the principle of proportionality, he must keep the principle of humanity in his mind.⁶⁶

In a nutshell, the principles of limitation, military necessity, proportionality, distinction and humanity are applicable to non-international armed conflicts in the same way as they are applicable to international armed conflicts.

1.3.5 The Second Additional Protocol of 1977

As for as, additional protocol II is concerned, it deals with the rights of those who are captured during the fighting, wounded and *hors de combat* combatants and civilians. Some rules regarding the safety of civilian population and cultural heritage are also prescribed in this protocol. This Protocol is generally deemed as an addition and explanation to the Common Article 3 of the GCs. This Protocol has not been signed by many states of the world including Pakistan. However, most of the rules prescribed in this Protocol are those which are already there in customary law, GCs, other treaties and general principles, and these are recognised by the states.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

Article 4 (2) of Additional Protocol II, talks about the following fundamental guarantees and declares that the following acts are prohibited and will remain prohibited at any time and any place whatsoever:

- (a) Violence to life, health and physical or mental wellbeing of persons.
- (b) Cruel treatment like torture, mutilation, or corporeal punishment.
- (c) Collective punishment.
- (d) Taking as hostages.
- (e) Acts of Terrorism.
- (f) Outrages upon personal dignity, rape, enforced prostitution, indecent assault.
- (g) Slavery and slave trade.
- (h) Pillage.
- (i) Threat to commit any of foregoing acts.⁶⁷

Article 5 of the Protocol talks about those persons whose liberty has been restricted. The rights and duties of such persons are elaborated here in this article.

Article 6 of the Protocol talks about the prosecution and punishments of criminal offences related to the armed conflict.

Part 3 of the Protocol deals with the wounded, sick and shipwrecked. These people should be protected and respected. Article 8 is about the search of such people, meaning thereby that without any kind of delay wounded, sick and shipwrecked should be searched and collected for medical care.⁶⁸

Part 4 is about the protection of civilian population, where civilian population and individual civilians enjoy general protection from military operations. They shall not be made the object of attack. The indispensable objects for the survival of life of civilian population are being protected according to the articles of part 4 of the protocol. They can not be pressurized to move

⁶⁷ Art 4(2), Additional Protocol II, 1977.

⁶⁸ *Ibid*, Art 5-8.

from one place to another place. The places of worships and cultural objects are also protected property.⁶⁹

1.3.6 Domestic Law of the State

The domestic law of the state is also applicable in internal conflicts. The belligerents and rebels may be tried under the domestic law of the state and they can be punished as well.

This is one of the major problems in making the non-state actors comply with the law of armed conflict. However, as we know, IHRL is also applicable in such conflicts; the state must abide by its obligations under that law.

1.4 Three Important Lacunae in the Legal Regime for NIAC

The most serious issue for the legal regime on NIAC is the determination of the state of conflict. Almost invariably, states refuse to acknowledge that there is a conflict within their frontiers. They always call it a 'law and order' problem. Moreover, they declare it their internal affair in which they do not allow interference by the international community or organizations.

Another serious issue is how to make the rules of IHL binding on non-state actors, particularly those resistance movements which deny the legitimacy of the very existence of a state? They, generally, do not acknowledge that they are bound by the treaties concluded by the state against which they raise up arms and from which they want to secede.⁷⁰

Yet another important issue is status determination of those who take part in hostilities. In IAC, those who are lawfully entitled to take part in combat are called *combatants*.⁷¹ As they are allowed to take part in combat, they are given a license to kill and wound the enemy combatants.

⁶⁹ *Ibid.*, Art 13-17.

⁷⁰ Sadia Tabbasum, *Combatants not bandits: the status of rebels in Islamic law*, *International Review of the Red Cross*, 93:881 (2011), 121-139.

⁷¹ Tabbasum, Sadia, *The Problem of Unlawful Combatants: A Hard Case for International Humanitarian Law*, Unpublished LLM Thesis, Faculty of Shariah and Law, International Islamic University Islamabad, 2009.

They cannot be punished for these acts unless they commit a violation of the laws and customs of war. When *combatants* are captured, they are given the status of Prisoners of War (POWs) who are protected by Geneva Convention III.⁷² As opposed to this, those who take part in hostilities in NIAC, they are not given the status of *combatants*, and when captured they are not given the status of POWs. This is because primarily these people are dealt with under the law of the land. And under the law of the land, these people are considered criminals and lawbreakers. That is why, non-state actors find little, if any, attraction in complying with the rules of IHL in NIAC.

⁷² *Ibid.*

CHAPTER 2

ISLAMIC LAW AND THE CONDUCT OF HOSTILITIES

Like all other aspects of life Islamic law has given a comprehensive guide, basic principles & general rules about war in order to keep war inside the circles of humanity. The *fuqaha* have derived a detailed version of *jus in bello* from the teachings of the Prophet (peace be on him) and his rightly guided Caliphs. This code of conduct is obligatory upon Muslims no matter the other party is not obeying this conduct or not. In this Chapter, we will briefly explain some of the fundamental general principles of Islamic *Jus in Bello*. These are generally accepted principles and Muslims are under obligation to follow these principles whether they fight against Muslims or against or non-Muslims.

2.1 War: A Necessary Evil

Islamic law has permitted war as the last and final resort to solve a problem. If there is a peaceful way out, Islamic law stresses upon following it. That is why a majority of the *fuqaha* is of the view that the cause for war against non-Muslims is not the fact that they are non-Muslims, but the fact that they fight Muslims. In technical terms, it is said that cause of war is not *kufir* but *muharabah*.⁷³ It is on this basis that Islamic law makes it obligatory upon Muslims to invite non-Muslims to embrace Islam before waging war against them, if they have not been invited before.

Once the Prophet (peace be on him) said to Mu'adh (Allah be pleased with him):

Do not fight with them unless you invite them. If they are not ready to accept your invitation, even then do not fight them. Then if they start war against you, do not fight them till they kill someone amongst you. Then, show them the dead body and ask them: is

⁷³ See for details: Muhammad Mushtaq Ahmad, *Jihad, Muzahimat aor Baghawat*, (Gujranwala: Al-Shariah Academy) 2008.

there any good way out of this? Thus, if Allah shows the right way to people because of you that is better from the entire universe.⁷⁴

Having said that, Islamic law has also recognized the principle of military necessity. Hence, in some special cases Islamic law has given the permission to attack the enemy even if there is a chance that civilians or non-combatants may also be targeted in such attacks.⁷⁵ For example if in a forte a Muslim is being kept as a prisoner and to capture that forte is very much necessary for Muslims then in such case Muslims can attack that forte even though there is a chance that the Muslim prisoner may also be targeted in such attack.⁷⁶ During such attacks Muslims are bound to follow the following conditions.

- Intentionally targeting those who are illegitimate target is prohibited in such attacks, such as non-combatants or Muslim prisoners.
- All possible precautions must be taken to spare them.⁷⁷

Hence, it is obvious now that Islamic law has recognized the principles of military necessity, collateral damage and proportionality.⁷⁸

2.2 Upholding the Principles of Humanity

Islamic law has made it obligatory that during attack the principles of humanity must be followed in all circumstances.

⁷⁴ Abu Bakar Muhammad b. Sahal al-Sarakhsi, *al-Mabsoot*, vol. 10 (Beirut: Dar al-Fikar, 2000), 36.

⁷⁵ See for details: Mushtaq, *Jihad, Muzaahimat aor Baghawat*.

⁷⁶ Al-Sarakhsi, *al-Mabsoot*.

⁷⁷ *Ibid.*

⁷⁸ Mushtaq, *Jihad, Muzaahimat aor Baghawat*.

2.2.1 Qur'anic Verses

When Muslims were granted permission of resisting violence against them, they were being told at that very time that they should not exceed the limits at any cost. "And those who, when an oppressive wrong is inflicted upon them, (are not cowed) help and defend themselves. The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah. For (Allah) loveth not those who do wrong."⁷⁹

In another place the Almighty Allah tells us that, " And if ye do catch them out, catch them out no worse than they catch you out: But if ye show patience, that is indeed the best (course) for those who are patient."⁸⁰

Similarly, when they were allowed to fight against the oppressors they were directed not to exceed the limits. "Fight in the cause of Allah who fights you, but do not transgress limits; for Allah loveth not transgressors."⁸¹

‘Abdullah b. ‘Abbas (Allah be pleased with him), the famous companion of the Prophet (peace be on him), says that all the acts prohibited during war by the Prophet, such as killing women and children, mutilation, are considered as excess from the prescribed limits. The same has been the opinion of his disciple Mujahid as well as of Umar b. Abd al-‘Aziz and Ibn Jarir al-Tabari also prefers this view.⁸²

2.2.2 The Prophetic Traditions

Hence, it will not be out of place to mention some of the instructions of the Prophet (peace be on him), which he gave on different occasions of sending troops to different areas. These

⁷⁹ Qur`an, al-Shura, 42:39,40.

⁸⁰ *Ibid*, al-Nahl, 16:126.

⁸¹ *Ibid*. al-Baqarah, 2:190.

⁸² Abu Jafar Muhammad bin Jareer al-Tabari, *Jame al-Bayan*, vol. 2 (Al-Qaherah: Matba`ah Mustafa al-Babi, 1954), 189-90.

instructions are being narrated by different narrators. One of the basic narrations is that one with which Imam Muhammad b. al-Hasan al-Shaybani starts the *Shorter Book on Muslim International Law* as well as the chapter on *Siyar* in his book *al-Asl*. In this tradition, the Prophet (peace be on him) is reported to have said: "Fights those who do not believe in Allah; do not misappropriate; do not commit perfidy; do not mutilate; and do not kill children."⁸³

The first sentence apparently suggests that war is waged against every non-Muslim. This, however, is not correct and it was specific to the occasion on which non-Muslims were the enemy and who came to fight Muslims because they were Muslims. Thus, Sarakhsi says:

This is apparently general but in fact it has been specified by other texts. Hence, the meaning of this part is: fight those non-Muslims who are combatants and who are fighting you. Do you not see that when the Prophet saw the dead body of a woman during the conquest of Makkah, he became angry and exclaimed: 'She was not fighting!' An argument for this interpretation in this narration is that the Prophet prohibited the killing of children.⁸⁴

The prohibition of misappropriation specifically refers to war booty, while perfidy means breach of promise.

It was a general practice during the time of Arab ignorance that they were mutilating the dead bodies, they used to cut organs from those dead bodies and similarly they were showing their anger to the opponent party. The Prophet (peace be on him) has prohibited the Muslims from doing these kinds of acts. Similarly, he has prohibited the Muslims to kill children on so many occasions.

⁸³ Sahih Muslim, *Kitab al-Jihad wa al-Siyar*, Bab Ta'amir al-Imam al-Umara ala al-Bu'os wa Wasiat Iyyahum, Hadith No. 3261.

⁸⁴ Al-Sarakhsi, *al-Mabsoot*, vol. 10, 7.

On the eve of Makkah's conquer the Prophet (peace be on him) said: "Do not kill the one who leaves the battlefield, run away, and do not attack any wounded person."⁸⁵ According to some narrations, he also prohibited killing the prisoners of war on this occasion.⁸⁶

Accordingly, the Prophet (peace be on him) educated the Muslims that killing non-Muslims are allowed to the extent of war necessity. Muslims are bound to kill non-Muslims in a better way. They are supposed not to torture and kill non-Muslims in harsh and bad way. As, this is the rule for slaughtering animals that the animals will be slaughtered in a better way. "Allah has ordered the entire creature to deal others in a better way. So, when you are killing someone, kill in a good way, if you are slaughtering animal, slaughter in a better way."⁸⁷ In another tradition, he is reported to have said: "Believers are best of the people in the manner of killing."⁸⁸

On one occasion of sending troops for a battlefield, the Prophet (peace be on him) ordered them to burn some people. Then he called them and told them not to burn them, but to kill them in ordinary. "Punishing with fire is right of the Creator of fire."⁸⁹

Similarly the Prophet (peace be on him) prohibited the Muslims form robbery and loot. On the eve conquest of Khaybar; some people badly treated the conquered people. The Prophet (peace be on him), was very angry on such behavior and said: "Allah Almighty has not given you the permission of entering the homes of the People of the Book without their permission, or to beat their women or eat their fruits."⁹⁰

Once the Prophet (peace be on him), was informed that Muslims are cooking some meat which was looted from non-Muslims, he destroyed that meat and said: "Looted property is not better than carrion."⁹¹

⁸⁵ Mustaq Ahmad, *Jihad, Muqabamat aor Baghawat*. 326.

⁸⁶ *Ibid*.

⁸⁷ Sunan Tirmizi, *Kitab al-Diyyat*, Hadith No. 1329; Sahih Muslim, *Kitab al-Sayed wal Zabaib*, Hadith No. 3615.

⁸⁸ Sunan Abu-Dawood, *Kitab al-Jihad*, Hadith No. 2292.

⁸⁹ *Ibid*, Hadith No. 2299.

⁹⁰ *Ibid*, *Kitab al-Khiraj wal-Amarah wal-Fay*, Hadith No. 2652.

⁹¹ *Ibid*, Hadith No. 2330.

A common Arab practice was that whenever their troops were going to some places, they would disturb common people and passersby. The Prophet (peace be on him) said: “Whoever makes the way congested or whoever disturbs people their struggle is not in the way of Allah”.⁹² On another occasion, He has reported to have said: “When you are dispersed in different valleys, it is an evil act.”⁹³

In the pre-Islamic Arab society, war was known as *Wagha*, which means to make big noise and panic. The Prophet (peace be on him) prohibited such things and made war a sacred act of worship. He liked *Takbir & Tablil* during war and even then asked people not to raise their voices: “O People! Walk with dignity. The One Whom you are calling is neither deaf nor far away. He is with you; He Hears; He is near.”⁹⁴

So, it is famous about the Companions that they dislike speaking loudly specially on three occasions namely, during funeral prayer, during war and during recitation of the Holy Qura`an.⁹⁵ Imam Shaybani says that this loudness was not prohibited because it was wrong in the religion but it was a war tactic as because of this loudness the enemy would have got information about the actual position of the army. However, on some occasions it deems necessary to loud your voice. Imam Sarakhsi would explain this:

It means that because of this loudness of voices the *Mujabideen* are getting frsh and they are getting energetic and sometimes it cause pressure to the enemies. A Companion of the Prophet (peace be on him) namely Abu Dajana was having very loud voice and the Prophet (peace be on him) said that the voice of Abu Dajana works like a troop.⁹⁶

⁹² Sunan Abi-Dawood, *Kitab al-Jihad*, Hadith No. 2330.

⁹³ *Ibid*, Hadith No. 2259.

⁹⁴ Sahih al-Bukhari, *Kitab al-Jihad wal-Siyar*, Hadith No. 2770.

⁹⁵ Abu Bakar Muhammad b. Sahal al-Sarakhsi, *Sharh al-Siyar al-Kabir*, vol. 1 (Beirut: Dar al-Fikar, 2000),

⁹⁶ *Ibid*.

Similarly, the Prophet (peace be on him) ordered to obey the Commander of the troops and He also ordered to fight the war in a systematic and organized way to avoid any kind of disturbance on earth.

Wars are of two types: anyone who fought in the way of Allah to make Allah happy, obeys the Commander of the troops, spent his best wealth and stopped himself from disturbing the earth, all of his deeds will be awarded. And whoever fought to become famous, disobeys his Commander and disturbed the normal system of the earth, he will never be awarded and he cannot be escaped.⁹⁷

On another occasion, the Prophet (peace be on him) said:

Whoever obeyed me, indeed, he obeyed Allah, and whoever obeyed the Commander, indeed, he obeyed me, and who disobeyed the Commander, he indeed disobeyed me. The Commander is like a shield behind which war is fought and to save you. If he insists on *Taqwa* and he do justice to you so he will be rewarded and if he orders something else he has to face the consequences.⁹⁸

Similarly, the behavior of the Prophet (peace be on him) towards the prisoners of war and the subdued people was exemplary. He did not breach any single treaty in His life. He prohibited breach of treaty and perfidy. Nevertheless, allowed ruses of war through his action and saying. He is reported to have said on one occasion: "War is the name of ruses".⁹⁹

⁹⁷ Sunan al-Nisai, *Kitab al-Bia'ab*, Hadith No. 4124.

Sunan Abi-Dawood, *Kitab al-Jihad*, Hadith No. 2154.

⁹⁸ Sahih al-Bukhari, *Kitab al-Jihad wal-Siyar*, Hadith No. 2737.

Sahih Muslim, *Kitab al-Amarah*, Hadith No. 3418.

⁹⁹ Sahih al-Bukhari, *Kitab al-Jihad wal-Siyar*, Hadith No. 2803.

Sahih Muslim, *Kitab al-Jihad wal-Siyar*, Hadith No. 3273.

Sahih Tirmizi, *Kitab al-Jihad*, Hadith No. 1598.

2.3 Prohibition of Mutilation

One of the acts specifically and emphatically prohibited by the Prophet (peace be on him) is that of mutilation. He not only prohibited mutilation of humans but also of animals. ‘Ali (Allah be pleased with him) advised his son Hasan (Allah be pleased with him) about the one who had wounded him:

If I remained alive, I would myself decide his fate. But if I die of this injury, injure him just once; do not mutilate his body as I heard the Prophet (peace be on him) prohibiting mutilation even of a mad dog.¹⁰⁰

The Prophet (peace be on him) gave exemplary punishment to the people of the tribe of ‘Uraynah. Their hands and legs were cut, hot pieces of steel were entered into their eyes and then they were left alone to die in such condition. They demanded for water but they were not given water, nor were they given medical treatment till they died. Some people quote this incident in favor of mutilation but it is not the case because this was an exceptional case and it was an incident of a specific punishment. It was neither the case of *hirabah*, nor *Apostasy* nor *Qisas*, but that of *siyasab*.¹⁰¹ After this incident, the Prophet (peace be on him) would specifically stress upon the prohibition of mutilation, which simply means that this was just a one-time exception for specific reasons and that this practice was abrogated.

Imran bin Hasin (Allah be pleased with him) reports: “After the incident of mutilation of the tribe of Aareena, whenever the Prophet (peace be on him) was giving us lecture, He insisted to spend in the way of Allah and to prohibit ourselves from mutilation.”¹⁰²

Moreover, the *fugaha*’ are of the opinion that this prohibition includes killing a person after tying him with a rope or anything else. Abu Ayyub Ansari (Allah be pleased with him) narrates: “I

¹⁰⁰ Al-Tabarani, *al-Mu’jam al-Kabir*, vol. 1 (Beirut: Dar al-Kutub al-Arabia 1977) 97.

¹⁰¹ Mushtaq, *Jihad, Muqahimat aor Baghawat*

¹⁰² Al-Sarakhsi, *al-Mabsoot*, vol. 10, 7.

have listened the Prophet (peace be on him) prohibiting killing following tying a person. So I swear by God that I will never slaughter any hen or chicken while tying that.”¹⁰³

Similarly, to cut the head of a person and then to show it to the public is also forbidden and the jurists consider it as the case of mutilation. That is why the first Rightly-Guided Caliph Abu Bakar al-Siddiq (Allah be pleased with him) disliked the act of Muslims when they brought before him the head of a Christian Commander. When they said that the people of Rome and Iran do the same, he replied: “We are neither Iranians nor Romans; the Book of Allah and the teachings of the Prophet (peace be on him) are enough for us.”¹⁰⁴

Imam Sarakhsi would give two more reasons for prohibition of mutilation, firstly that mutilation of even a mad dog is prohibited so that of a human will remain prohibited with priority; and secondly the Rightly-Guided Caliph Ali (Allah be pleased with him) did not mutilate the bodies of the rebels and his conduct is the basic source for the rules about rebels.

Hence, in case of rebellion or using the terminology of IHL, non-international armed conflict, Muslims have to follow the conduct of Ali (Allah be pleased with him) and avoid these inhuman practices.¹⁰⁵

2.4 Individual Criminal Responsibility

Islam recognizes war as a necessary evil but it does not allow anything to be done during war. Islam focuses on the basic principles of humanity and it prohibits so many acts like mutilation.

Islamic Law is also recognizing the concept of individual criminal responsibility. This principle of Islamic Law is simple up to some extent, as it has been declared by the Shariah that whatever is declared forbidden by Islamic Law remains forbidden in each and every situation. So nobody can take the plea that an act was forbidden by the rules of Islamic Law but I was

¹⁰³ Sunan Abi-Dawood, *Kitab al-Jihad*, Hadith No. 2312.

¹⁰⁴ Al-Sarakhsi, *al-Mabsoot*, vol. 10, 139.

¹⁰⁵ *Ibid.*

compelled by the Ruler or Commander to do that forbidden act and to obey the Ruler or Commander is obligatory. The Prophet (peace be on him) has explicitly mentioned that no one is allowed to obey the creature against the orders of the Creator.

He is reported to have said: "It is forbidden to obey the creature when it amounts to disobedience the Creator."¹⁰⁶ Once the Commander of the troops of the Companions of the Prophet (peace be on him) got angry and he ordered his troops to enter into the fire, and said to obey your Commander is obligatory and hence you have to get into the fire. The troops refused to obey his orders and said we embraced Islam in order to save ourselves from the fire of hell. This incident was reported to the Prophet (peace be on him) and he said: "Had they entered the fire, they would have to remain in it forever; obedience is allowed in permitted acts, not in the prohibited acts."¹⁰⁷

Similarly, the Islamic Law also recognizes the principle of command responsibility and the commander is held responsible for the acts of his troops. When Khalid bin al-Walid (Allah be pleased with him) mistakenly killed the people of Banu Jadhimah, the Prophet (peace be on him) gave compensation to the heirs of the dead and also compensated the financial loss caused to the people, although the Prophet (peace be on him) had not asked him to do so. However, being the ruler and the commander-in-chief of the Islamic State, the Prophet (peace be on him) deemed himself responsible for the acts of the troops sent by him.¹⁰⁸

¹⁰⁶ Musnad Ahmad, Musnad Ali bin Abi Talib, Hadith No. 1041.

¹⁰⁷ Al-Sarakhsi, *Sharh Kitab al-Siyar al-Kabir*, vol. 1, 117.

¹⁰⁸ Sahih al-Bukhari, *Kitab al-Maghazi*, Hadith No. 3994 and Shibli Nomani, *Seert ul Nabi (peace be on him)*, vol. 1, 344.

2.5 Instructions of Abu Bakr (Allah be pleased with him)

We may also refer to the famous ten commandments of the first Rightly-Guided Caliph Abu Bakar Siddique (Allah be please with him) to the commanders of his troops at the time of dispatching the troops.¹⁰⁹ These are as follows:

Do not embezzle. Do not cheat. Do not break trust. Do not mutilate. Do not kill a minor child or an old man of advanced age or a woman. Do not hew down a date palm nor burn it. Do not cut down a fruit tree. Do not slaughter a goat, cow, or camel except for food. Maybe you will pass near people who have secluded themselves in convents; leave them and their seclusion. Moreover, it may be that you pass near people who will bring to you dishes of different foods, if you eat, utter the name of the God over them.

These commandments are the guiding principles for any military mission against the enemies of Islam. These golden rules were followed by all the Rightly-Guided Caliphs (Allah be pleased with them) and other companions of the Prophet (peace be on him). The Muslim conquerors never kept aside these rules, rather they acted upon them as their legal obligation, and this can be seen from the history of the Muslim rulers and conquerors.

¹⁰⁹ Muhammad Hamidullah, *The Muslim Conduct of State*, 301.

CHAPTER THREE

THE ISLAMIC *JUS IN BELLO*

FOR REBELLION

After brief explanation of the general Islamic *jus in bello* in the previous Chapter, we will now explain the specific Islamic *jus in bello* for rebellion and internal armed conflicts. Here, we will not go into the details of legality or illegality of a rebellion or *baghy*, as that is an issue of *jus ad bellum* which is beyond the scope of the present thesis. We will confine our discussion to issues of *jus in bello* only. We will first discuss the legal position and obligations of the government which fights the rebels. After this, we will explain the rights and obligations of the rebels. After this, we will discuss in detail the prescribed rules for the conduct of hostilities applicable to both parties.

3.1 The Rights and Obligations of the Government

The basic source for the rules of this chapter have been derived from the conduct of the Rightly-Guided Caliph ‘Ali (Allah be pleased with him). He had to fight the rebels on many occasions. That is why Imam Shaybani in *al-Siyar al-Saghir* presents his precedents in the chapter of *Khawarij* and then builds the whole legal edifice on these precedents.¹¹⁰

3.1.1 Justification for War against Rebels

The first tradition in this regard is from Kathir al Hadrami, who saw some of the rebels setting together in the Grand Mosque of Kufah and were criticizing ‘Ali (Allah be pleased with him). One of these swore to kill ‘Ali (Allah be pleased with him). Kathir caught him and the rest of them ran away. He took him to ‘Ali (Allah be pleased with him) and told him the entire story. ‘Ali

¹¹⁰ Shaybani, *Kitab al-Siyar Saghir*.

(Allah be pleased with him) asked his name and then set him free. Kathir wondered and said that this person swore to kill you. ‘Ali (Allah be pleased with him) said: “Should I kill him who did not kill me yet?”¹¹¹

From this, the jurists derive the rule that unless the rebellion breaks out, the ruler cannot punish anybody with death penalty. “Here in this saying, there is a legal argument regarding this rule, when there is no explicit form of rebellion from a person, it is not legitimate for the ruler to kill him.”¹¹² However if the ruler get information from a reliable source about the gathering of the people for rebellion ship, then the ruler should take measurement to imprison them before the rebellion took place, in order to settle the matter before bloodshed. “Until they did not intent of rebellion then the ruler will not disturb them. But if the ruler gets the information of a strong intention of rebellion then he has the power to imprison them before the situation gets out of control.”¹¹³

Imam Shaybani quotes another report. Once ‘Ali (Allah be pleased with him) was giving a sermon in a mosque, and suddenly from different corners of the mosque, people started slogans that “The Authority is for Allah alone.” They were objecting the matter of rule and government of ‘Ali (Allah be pleased with him), and were trying to disturb him during the sermon. ‘Ali (Allah be pleased with him) said that you are talking about the right thing, but what you mean is wrong. Then he said: ““We will not forbid you to recite the name of Almighty Allah in our mosques, we will give you share from booty until your hands are in our hand, and we will not fight until you didn’t intent to fight with us.”¹¹⁴

The jurists of Islamic law derives the maxim that when there is no such measure from rivals of the government which can be termed as rebellion, then even the government cannot imprison them. It should be clear that when people were shouting against the rule (*tabkim*), in fact, they were expressing their views, according to which ‘Ali (*Allah be pleased with him*) and other

¹¹¹ Muhammad b. abi-Sahal al-Sarakhsi, *al-Mabsoot*, (Beirut: Dar al Fikr, 2006). vol 10, 136

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

companions (God forbid) did the crime of (*kufir*), who agreed on the matter of rule (*tabkim*). Therefore, as they did not committed the *Kufir* directly but only mentioned indirectly, that is why Imam Sarakhsi says:

In this, there is also an argument that the punishment cannot be award for using such a word that has multiple meanings. As ‘Ali (Allah be pleased with him) did not award the punishment to them. Although they used the words with multiple meanings, which indicated that ‘Ali (Allah be pleased with him) has committed *Kufir*, and punishment for inclination towards *Kufir* is mandatory, if crystal clear words are used¹¹⁵... There is evidence in this quote that when rebels fight non-believers along with the government of *ahl al-‘adl*, they are the co-sharers in taking booty like other Muslims.¹¹⁶

It is obvious from conduct of ‘Ali (Allah be pleased with him) that the aim and objective of the fighting against rebellions is to finish the rebellion ship and not the rebellions themselves. “Again we can see that the fighting against the rebellions is only permissible in defense because ‘Ali (Allah be pleased with him), said that we would not fight you unless you fight us.”¹¹⁷

3.1.2 Negotiations with Rebels before War

The Central Government should invite the rebels to restrain from rebellion and should try to convince them to obey the government.

Likewise, it has been reported from ‘Ali (Allah be pleased with him) that he sent *Ibn e Abass* (*Allah be pleased with him*) to the people of *Harwara*. He had a conversation with them and invited them to come back and leave those activities, which are against Islam. If aim could be achieved by convincing through conversations and advises instead of war, so it is better to give preference to it, because poison is the last cure (last option is war then).¹¹⁸

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, 133-34

¹¹⁷ *Ibid.*, 134

¹¹⁸ *Ibid.*, 136

From the Shafi'i School, Imam Abu Ishaq al-Shirazi says:

The ruler will not start fighting until he asks them (rebels) as to why they want to rebel against the ruler? If they mention about an injustice, the ruler should remove the particular injustice. If they mention any doubt, the ruler should do something to remove that doubt. As Almighty Allah says in the Quran, "reconciles between these two groups"; and whatever we mention, there is a good way in it.¹¹⁹

Further, he adds:

If the rebellions do not agree to leave their rebellion ship, then the ruler should create a fear of fighting amongst them, even then, if they do not agree, then the ruler may start war. If the rebellions demand time for thinking and if such time is for some days then the ruler may give such time. If they demand longer time then the ruler must think that either rebellions are taking advantage of time for preparation of war.¹¹²⁰

All these principles discussed above shows that jurists consider the war as the last resort against the rebellions. However, if the government takes pre-emptive attack without warning to the rebellions, even then in such situation it may not be called illegitimate. Because rebellions know the cause of attack on them, their situation in this case is like apostates or such non-believers who got the invitation of Islam already. Therefore, according to such circumstances the use of those weapons is valid which the Muslims are allowed to use against non-Muslims or apostates.

Due to this reason, all the weapons and methods can be used by Muslims against them, which are used against the aggressors (*abl al harb*), those methods are, for example, javelin through, to open water, put on fire and blood shed, because war with them is obligatory as it is obligatory against the aggressors and apostates.¹²¹

¹¹⁹ al-Shirazi, *al-Muhazzeb*, vol 3, 400-01

¹²⁰ *Ibid.*

¹²¹ al-Sarakhsi, *al-Mabsoot*, (Beirut: Dar al Fikr, 2006). vol 10, 137

3.1.3 The Rights of Rebels

Here we discuss some principles, which were issued by 'Ali (Allah be pleased with him) on the eve of the Battle *Jamal*: "Do not follow the person who leaves the battlefield. Do not kill any prisoner. Do not attack any wounded person. Do not lift any veil. And do not any snatch property."¹²²

These rules are very important and basic about rebellion and civil war from the perspective of the conduct of hostilities. Imam Sarakhsi mentioned several legal principles while explaining these rules.

We accept all these rules. Therefore, we would say, while fighting with the rebellions, The Central Government should not follow those who leave the battlefield because we fight with them in order to eliminate their rebellion ship, and the moment they left the battlefield, aim has been achieved. However, this rule is applicable when The Central Government knows that their group has been finished and now they are unable to reunite. If their group still exists, then they will be followed, as in such situation they did not leave the battlefield because they have left behind their rebellion ship, but they are running towards their group in order to come back for another new attack. Due to this reason, non-believers who leave the battlefield are followed or chased, because their group remains in *abl al harb*. Likewise, their prisoner will not be killed if their group is no more remaining.¹²³

The method adopted by 'Ali (Allah be pleased with him) was that he would take oath from the prisoner that after the acquittal he would not come out against the ruler. Nevertheless, if prisoner would have any group to support then there is no hesitation in his killing, because his evil is not finished yet. However, in fact he was suppressed temporarily. In addition, if the ruler feels

¹²² *Ibid.*

¹²³ *Ibid.*

expediency in killing the prisoner, then he can kill him. Similarly, their wounded would not be attacked if their group were not remaining any more.

Moreover, we say that their women and children must not be enslaved, as they are Muslims, and their property cannot be acquired by way of suppression, because of being safe in *dar al-Islam*, they are protected. As the rule of ownership by way of suppression is restricted to particular place, where the protection is not present of being staying in *dar al-Islam*.¹²⁴

3.1.4 Weapons Obtained from Rebels

On the basis of these maxims, Imam Shaybani mentions the following principles, that the Central Government can use those weapons rebellions for the sake of need which they got in war. However, after ending of rebellion ship such weapons shall be returned to its owners because in *dar al-Islam* the ownership cannot be acquired by anger and suppression.

Similarly, the property shall be returned to its owners as the ownership of occupiers does not exist on the property and because the protection of property still exists. The reason of this is that the property which has been got due to suppression does not exist until the suppression or dominance gets complete. In addition, dominance completes in such a way when the snatched property stores in other different state that of the person, from whom the property is snatched. As according to Islamic law the rebellions and armed forces of the state belong to one state, so deference of state does not exist here.¹²⁵

In favor of this principle Imam Shaybani argue from the conduct of ‘Ali (Allah be pleased with him):

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

We got this information from 'Ali (Allah be pleased with him) that he thrower all the things in an open field, which he got from people of *Nabrawan*. Then every body took their belongings which they recognized. Until and unless, a person recognized the last remaining thing and he took it, which was an iron pot.¹²⁶

3.1.5 Treatment with Women of the Rebels

After this, Imam Shaybani gives attain to the matter that, if the property of rebellions cannot be termed as booty then what should be done with the women of the rebellions. Here he again presents a very important example from conduct of 'Ali (Allah be pleased with him). "When 'Ali was asked on the eve of battle *Jamal* that would you divide every thing amongst us which Allah Almighty awarded us with, he asked who will take 'A'ishah (Allah be pleased with her)?"¹²⁷ Imam Sarakhsi says while explaining the above quoted saying of Ali (Allah be pleased with him), that Ali (Allah be pleased with him) said this in order to clarify their shameless and unreasonable demand."¹²⁸

Therefore, the jurists of Islamic law derived the principle from the conduct of 'Ali (Allah be pleased with him) that women of rebellions only can be killed or wounded during war on the basis of resistance. Even non-Muslim women cannot be killed after war if they have actively participated in war, how women of rebellions can be killed. So, they can be imprisoned if they have actively participated in war.

However, if she was fighting then to imprison her would be sufficient, until no one remains in the rebels. A woman cannot be killed because of her apostasy, so how can she be killed because of rebellion? When she is participating in fighting, at that time she can be killed for the purpose to end her evil and when she is imprisoned, the purpose has been achieved.

¹²⁶ *Ibid.*,135

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

However, she will be imprisoned because of committing the sin, and to forbid her from mischief in future.¹²⁹

According to these principles, it is settled that, the property gained from rebellions if perishable, then it is the duty of government to sell it and such price shall be preserved to be returned to the owners. In addition, at the end of rebellion ship the money shall be returned to the actual owners, when there is no chance of reunion of the rebellions.¹³⁰

3.1.6 Peace treaty with Rebels

If rebels offer a peace treaty to the Central Government, and if they feel it better for Muslims, then they can have the treaty with them. However, it is not permissible for the Central Government that they would take some money from the rebellions, because it is similar with *Jizyah*, which cannot be imposed on any Muslim.¹³¹ If that treaty describes that both the parties would give some men for guarantee to each other, and rebellions kill those men of the Central Government in their custody, even then it is not permissible for the Central Government to kill the rebellions in their custody though the treaty permits.¹³²

If a person of the Central Government gave peace, or concluded a peace treaty on his own, to any rebel, this peace treaty is valid and all the people of the Central Government will be bound to obey the requirements, because if a single Muslim has the power to give protection and peace to any non-Muslim, then he has the vested power to give peace and protection to a rebel, as he is a Muslim, though his crime is severe but it is less than that of infidels.¹³³

If one, amongst rebels concludes a peace treaty and comes to territory of the Central Government, so he has the right to enjoy his protection like (*Mustamin*). Consequently, if he is

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*, 136

murdered, the *Qisas* cannot be imposed on his murderer, however, *Diyat* (Blood Money) will be imposed on the murderer and he will be liable to pay that.

It is because of the doubt found in his status as a protected person, that to kill him is allowed. Don't you see that it is obligatory that he should be reached to his destiny safe and sound, and after that he would return to fight with us along with his group and then his killing would be legitimate. Therefore, *Qisas*, cannot be imposed on his murderer because of the obvious doubt, and *Diyat*, is imposed because at the moment he was innocent and was not indulged in any case against Muslims.¹³⁴

3.1.7 Crimes Committed in the Territory of the Rebels

If some persons from the Central Government goes for business to territory of rebellions, or they have been imprisoned there, and if they kills each other, no one will be charged for *Qisas*, even after the dominance of the Central Government on that specific place, because this crime occurred in such a place, which was out of control of the central government of the Central Government.¹³⁵ In the above mentioned circumstances, *dar al baghy* will be considered as state of war (*dar al harb*). However, if someone snatches property of rebellions and comes to the territory of the Central Government, the ownership of snatcher will not exist. In this case, *dar al baghy* will be considered as part of *dar al islam*, even if it is not under the central government of *dar al islam*.

3.1.8 Burial of the Dead Bodies of the Rebels

If some people of the Central Government find the dead bodies of rebels, they are not having the duty to give bath to the dead bodies or dress the dead bodies with coffin, or arrange the funeral prayer of those dead people. However, the burial of the dead bodies is obligatory on them.

¹³⁴ *Ibid.*, 137.

¹³⁵ *Ibid.*

The funeral prayers of the killed rebellions will not be arranged, not bath will be given to them. However, the dead bodies shall be buried in order to save people from bad smells etc.¹³⁶ The conduct of 'Ali (Allah be pleased with him) is narrated that he did not pray the funeral prayer of the people of *Naharawan*.¹³⁷

However, if amongst the dead rebellions, someone is relative of the Central Government, they can give bath to the dead body and dress with coffin; as well as they can offer his funeral prayer, with the condition that rebellion ship has been ended.¹³⁸

Cutting off the heads of rebellions and bringing them to cities, is a kind of mutilation and the Prophet (peace be on him) has forbidden the mutilation of starry and mad dogs even?¹³⁹

The rules for the killed among the Central Government is the same as for martyred. That they will not be bathed, but the funeral prayers will be offered, because 'Ali (Allah be pleased with him) did the same with the killed, and 'Ammar (Allah be pleased with him) and other Companions (Allah be pleased with them) also mentioned it in their wills.¹⁴⁰

3.1.9 The Killing of a Rebel's relative and the Right to Inheritance

If father or brother of the Central Government were a rebel then it would be better not to kill them during war. However, if *aadil* killed rebel relative then in such circumstances, he will not be deprived from heir ship, because this category of killing does not come under unjustified killing.¹⁴¹

¹³⁶ *Ibid.*, 140

¹³⁷ *Ibid.*, 138

¹³⁸ *Ibid.*, 135

¹³⁹ *Ibid.*, 139

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

3.1.10 Receiving Aid from Non-Muslims against the Rebels

The Shafi'i jurist, Imam Shirazi has explicitly mentioned that if two groups of rebellions fight with each other, then the ruler should not support any of the group because both are on the wrong and unjust path. However, if he would not be in a position or that he can get control on both the groups, so in such a situation he can seek support of one group and can fight against the other.¹⁴²

It does not reflect the purpose that one group would give support against other. Nevertheless, it's aiming to get the help of one group against other.¹⁴³... Moreover, if one group has been defeated, then they cannot fight against the group of rebellions whose support was with the Central Government, until they invite them directly towards the obedience of the right ruler, because they got their help against one group of belligerents and they helped them and are considered as protected people.¹⁴⁴

The Hanafi jurists have also explicitly mentioned in their work, to fight with the rebellions, and for this purpose, the help of some rebellions can be asked. However, they directly mention the condition that the command shall be in the hands of the Central Government. If command would be in hands of non-Muslim then this kind of help would not be valid. Imam Shaybani says: "To suppress the rebel and their belligerency, there is no harm in getting help from other rebellions or protection holders. But the condition would be that the rule of the Central Government will be dominant."¹⁴⁵

As opponent to the mentioned rule, if the Central Government demands help from non-Muslims against rebellions and in that help the non-Muslims gets dominance, then it would not be allowed to seek help of them against the rebels. "If rebellions gets dominance over the Central

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, 139-40.

¹⁴⁵ al-Shirazi, *al-Muhazzab*, vol 3, 405.

Government and push them into the area of non-Muslims, then it is not allowed for the Central Government to seek help of the non-Muslims against rebellions."¹⁴⁶

Imam Sarakhsi explains: "As the rule of non-Muslim would be dominant and it is not valid to acquire the help of non-Muslim against Muslims rebels, consequently dominance would be of the non-Muslims."¹⁴⁷

3.2 Rights and Duties of Rebels

Before the discussion of rights and duties of rebellions, it is necessary to differentiate between rebellions and ordinary lawbreakers.

3.2.1 Difference between Bandits and Rebels

One common thing between robbers and rebels is that both work in organized groups, which makes them powerful and can often result in them controlling a specific territory or region. Yet, the difference between the two entities is that often the robbers or thieves operate in an area for certain personal gains or purposes, whereas rebels work for bringing a change in the rulers or governing setup of a state. Similarly, the rebels might also want separation from a collective system, which to them is often founded on wrong basis. Legal experts give this fact the name of "*ta`vil*" (Challenging the legitimacy of the government about their opinion). The rebels consider this practice right but its status can be argued. The rebels have mainly two characteristics.

1: A group of persons powerful enough to capture some territory from a central government. This is called "*Man`na*" (the resistance capability) by the jurists.

2: The *abl al man`na* shall have "*ta`vil*". Moreover, the *abl e ta`vil* can not be called rebels if they don't have *man`na*, and therefore the rules of rebellion will not apply on them. In addition, the *abl al man`na* will fall in the category of dacoits if they have no *ta`vil*.

¹⁴⁶ *Ibid.*

¹⁴⁷ al-Sarakhsi, *al-Mabsoot*, vol 10, 141

A rebel who returns to the right path of Islam after killing or inflicting wounds or snatching property of a person from *dar al-adl* during a fight against *abl al adl* shall not be punished, no *Qisas*, *diyat*, *arsb* or *tort* are to be taken from him, whereas dacoits will be punished for all of the above mentioned crimes upon their arrest.

According to Imam Shaybani, a rebel who abandon rebellion and joins *abl al adl* would not have to pay for any damages during rebellion.¹⁴⁸ Imam Sarakhsi explains: "The rebels will not be asked for *daman* for any damage they had previously inflicted to the life and property of *abl al adl*".

Imam Shaybani's sayings mean it would be possible for rebels, given that they have power and stronghold. Furthermore, damages occurring in the past would be their responsibility because we have been told to convince them through arguments and discussion. Therefore, only *ta'vil* cannot finish the bases for *daman*, until power and strength is acquired by them.¹⁴⁹

Imam Shaybani further explains that people who have *ta'vil* but not enough power and strength and have caused damage to the Central Government will be punished.

3.2.2 Decisions of the Courts in *Dar al-Baghy*

Various aspects of the authority of courts in *dar al-baghy* have been discussed by Muslim jurists. However, only three important points will be examined here.

One important question often asked is that is a qualified person allowed to accept an appointment to be a judge under the rebel authority when he himself does not approve of the legitimacy of rebel authority. The answer, according to jurists, is that such a person is allowed to accept any such offer and even if he does not accept the legitimacy of the appointing authority, he should decide the cases in accordance with the provision of Islamic Law.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

Imam Shaybani says: "If a person belonging to a city controlled by rebels does not support the rebels but is appointed as a judge in that city, he shall enforce *hudud* and *qisas* and shall settle disputes between people according the norms of justice. He shall do so as there is not other option for him."¹⁵⁰

The jurists usually cite the quote the example of the famous Qadi Shurayh, who along with accepting appointment as a judge from Caliph Umar bin al- Khattab (Allah be pleased with him), acted as a judge in *kufah* during the dictatorial rule of the Umayyad Caliph Abd al. Malik bin Marwan and the governorship of Hajjaj bin Yusuf. The renowned Hanafi jurist *Abu Baker al-Jassas* quoated this exmple by 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 Hajjaj."¹⁵¹

Jurists have also cited the precedent of Umar bin Abd al-Aziz, the famous Umayyad Caliph who tried to restore the system of al-Khulafa' al- Rashidin, did not remove the judges appointed by his predecessor, a tyrant Umayyad Caliph. Imam Sarakhsi describes this rule through following legal principles:

One obligation of every Muslim is the deciding of disputes according to the norms of justice and protecting the oppressed from oppression as included in the meaning of 'enjoying right and forbidding wrong'. However, it is not possible for one who is among the subjects to impose his decisions on others. Once it is possible for him through an appointment by those in power, he should make decisions according to obligations upon him, regardless of his appointing authority being just or unjust. One condition for validity of appointment is that the judge should have capability of enforcing decisions, and this condition is fulfilled here.¹⁵²

¹⁵⁰ *Sarakhsi*, 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*, Vol. 8, p. 119.

¹⁵¹ *Jassas*, Vol. 1, p. 99.

¹⁵² *al-Sarakhsi, al-Mabsoot*, Vol. 10, p. 138.

The validity of the decisions of the courts of *dar al-baghy* is another issue. The fundamental principle laid down by the jurists is that a judge of *dar al-adl* will not accept a decision sent to him by a judge of *dar al-baghy*.¹⁵³

Two reasons have been given by Sarakhsi for this rule:

1: Rebels are sinners (*fussaq*) for the *dar al-adl* and the testimony and decisions of committers of major sins are unacceptable. In other words, the courts of *dar al-adl* cannot be bind legally by the courts of *dar al-baghy*.

2: The lives and properties of the people of *dar al-adl* are not accepted by the rebels as sacred or holy and hence, there is a possibility that a case in the court of *dar al-baghy* may have been decided on invalid basis.¹⁵⁴

Nevertheless, a decision by the courts of *dar al-baghy* could be termed valid and enforced after review by a judge of *dar al-adl*, if he concludes that the case was decided on valid legal grounds, such as the witnesses were not rebels.¹⁵⁵

However, if the background of the witnesses is not clearly known, the court of *dar al-adl* would not enforce the decision made by *dar al-baghy*, 'because it is presumed that the one living under the rule of rebels is also among them. Therefore, the judge of *dar al-adl* will act on this presumption unless proved otherwise'.¹⁵⁶

The net conclusion is that the courts of *dar al-adl* will not enforce decisions made by the courts of *dar al-baghy* unless the former determines a decision valid after a thorough review.

¹⁵³ *Ibid.*, Vol. 10, p. 142. The *Shafi'i* jurists hold that it is better for the judge of *abl 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*, Vol. 3, p. 407. The *Hanbali* jurists take the same position.

See also: *Ibn Qudamah*, Vol. 8, p. 120.

¹⁵⁴ *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 *abl al-'adl*. *Shirazi*, Vol. 3, p. 407

¹⁵⁵ al-Sarakhsi, *al-Mabsoot*, Vol. 10, p. 138.

¹⁵⁶ *Ibid.*

The third issue is the legal status of the decisions made by the courts of *dar al-baghy*, after the central government recaptures the territory under rebel control. Imam Shaybani says: "Many disputes are settled by a judge appointed by rebels after taking control of a city. If any decisions of the judge are challenged in the *dar al-adl* after recapture of the city by the central government, the judge of *dar al-adl* will enforce only valid decisions."¹⁵⁷

It could happen that any such decision is deemed valid according to one school of Islamic Law and invalid in the judgement of another school. In such scenario, the decision would be considered valid even if the judge of the Central Government belongs to the school that consider them invalid, 'because the decision of the judge in debatable cases is enforced'.¹⁵⁸ Therefore, those decisions of the courts of *dar al-baghy* will be invalidated that are against the consensus opinion of the jurists. Furthermore, the invalidation will only occur when an aggrieved party in the courts of *ahl al-adl* challenges these decisions. Thus, the decisions of the courts of *dar al-baghy* are usually not reopened.¹⁵⁹

3.2.3 Collection of Revenue by Rebels

Collection of revenue by the rebels from people living in the territory under their control would mean that the central government can not collect the revenue again if it resumes control of that territory.¹⁶⁰ The reason given in the famous Hanafi text *al-Hidayah* is that 'revenue can only be

¹⁵⁷ *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*, Vol. 3, p. 407.

¹⁵⁸ *Sarakhsi*, Vol. 10, p. 142. See also *Ibn Qudamah*, Vol. 8, p. 120.

¹⁵⁹ This is known as the doctrine of 'past and closed transactions'. For details: Sadia: Combatants, not bandits. IRR, 121-139.

¹⁶⁰ al-Marghinani, *al-Hidayah*, 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 *'usbr*, 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 *ji'zah* will, and for *kharaj* there are two opinions. *Shirazi*, Vol. 3, p. 407.

The same opinion is held by the Hanbali jurists. *Ibn Qudamah*, Vol. 8, pp. 118-119.

collected by the ruler when he provides his subjects security and in this case he failed to provide them security'.¹⁶¹

An important issue discussed at this point by jurists is that *Zakah* and *Ushr* are not the only categories of revenue but also acts of worship (*ibadah*). A question that arises here is that whether those who have already paid *Zakah and Ushr* to rebels would be liable before God to pay it again to the central government. The jurists reply to this question by saying that such people would be liable before God only if their revenues were not spent according to the prescribed law by the illegitimate rule of rebels.¹⁶²

3.2.4 Treaties of Rebels with a Foreign Power

A peace treaty in Islamic law is deemed to be a category of the larger doctrine of *aman*.¹⁶³ 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'ab*.¹⁶⁴ This *aman* granted by an individual Muslim binds all Muslims.¹⁶⁵

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*.¹⁶⁶ On the basis of these principles, the jurists explicitly stated that if rebels conclude a peace treaty with non-Muslims, it will not be

¹⁶¹al-Marghinani, *al-Hidayah*, Vol. 2, p. 412.

¹⁶² *Ibid.*

¹⁶³ *Imam Kasani* divides *aman* into two basic categories: *aman mu'abbad* (also called *dhimmah*) and *aman mu'qqat*. See *Kasani*, 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'ab* (peace treaty), which is concluded with a foreign group of non-Muslims who are willing to establish a peaceful relationship. *Muwada'ab* may be either time-specific (*mu'qqatab*) or not (*mutlaqab*). *Ibid.*, Vol. 9, p. 424.

¹⁶⁴ That is why a Muslim prisoner in the custody of the enemy or a Muslim trader in a foreign land cannot grant *Aman*. *Shaybani*, Vol. 1, p. 213.

¹⁶⁵ *Ibid.*, Vol. 1, p. 201.

¹⁶⁶ 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.

permissible for the central government to fight those non Muslims in violation of that peace treaty.¹⁶⁷

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. Therefore, this intention [to fight Muslims] must invalidate the *aman* from the beginning.¹⁶⁸

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*.

3.2.5 Cruelty of Rebels on People of the Area under Their Control

If rebels started fighting with each other after getting control of a city, and some of them intended to enslave some people of the city, then they have to fight against them. "As the

¹⁶⁷ al-Sarakhsi, *al-Mabsoot*, Vol. 10, p. 141. Not only that, but the *fuqaha'* also assert that, even if the rebels seize the property of these *abl 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.*

¹⁶⁸ *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*, Vol. 3, p. 406; *Ibn Qudamah*, Vol. 8, p. 121. The same principle applies to any treaty of the central government with non-Muslims for military support against Muslim rebels.

children of Muslims cannot be enslaved, therefore, the rebels are committing crime by enslaving them, and it is mandatory on every person who has power to stand against the crime and to stop cruelty on innocents."¹⁶⁹

3.2.6 Joining the Army of the Rebels from the Central Government

Any person among Muslims joins the army of the rebels, starts living in the area under their control, and has left his wife in *dar al adl*, then his marriage will be sustained, and the Central Government will not stop him to meet his wife. A person from the army of 'Ali (Allah be pleased with him) joined the army of the rebels and after that, he demanded about his wife. 'Ali (Allah be pleased with him) said: "You are helping our enemy against us he said does my act will be reason to stop you from justice, Ali (Allah be pleased with him) said: no."¹⁷⁰

This is also a matter of fact that the jurists never recognized any other government parallel to the central government in *dar al-islam*, not *de-facto* nor *de-jure*!

3.2.7 The Killing of an *Aadil* Relative by a Rebel and the Right of Inheritance

We have seen above that if a person from the Central Government, kills a rebel relative during fighting, then he will not be deprived of the right of inheritance, because such killing is not wrong. However, if a rebel kills his relative from *dar al-adl*, would he be deprived from the right of inheritance?

As rebel's fight based on *ta'wil*, and due to that *ta'wil*, he considers himself on the right way, if at the time of killing and even after that he still considers himself as the righteous person, then he will not be deprived from inheritance. However, if he has been convinced about the

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, 143.

wrongness of the *ta'wil*, and he accepts his mistake, then he will be deprived from the right of inheritance. In the text of *Bidayat al-Mubtadee* it is clarified:

"Therefore, if a rebel killed him and said, that I was on right at that time and even I am right now, then he will take his portion from the property of the deceased. However, if he said when I killed him and I knew that I was wrong then he will be deprived from his portion in the property of the deceased."¹⁷¹

3.2.8 Help of *Ahl al-Dhimma* with Rebels

If *abl al-dhimma* helped the rebels, their contract of *dhimma* remains intact. As the rebels remain Muslims even after the rebellion ship, similarly, *abl al dhimma* remains *abl e dhimma*. Imam Shaybani says:

If rebels seek help of *abl al dhimma* in fighting, and they (*abl al dhimma*) took part in fighting with them, then this act will not be considered for breaking the contract of *dhimma*. Look, the Muslims have their faith on Allah even after *baghy*, and it is nothing to do with the faith, similarly, the contract of *dhimma* remains intact as helping the rebels will not lead their contract to be finished.¹⁷²

3.2.9 Attack of a Foreign Power on Rebels

As a general rule, it is not permissible for *abl al-'adl* to support rebels in war. Hence, if during a war between *abl al-'adl* and rebels a person from among *abl al-'adl* is killed while he is on the side of the rebels, neither *qisas* nor *diyab* will be imposed on the one who killed him, as is the case

¹⁷¹ *Ibid.*, 143.

¹⁷² *Ibid.*

when a person is killed while he is on the side of non-Muslims.¹⁷³ However, when rebels are attacked by a foreign power, even the central government is under an obligation to support the rebels.¹⁷⁴

Shaybani says that this obligation is imposed even on those *abl al-'adl* who temporarily go to *dar al-baghy*: The same obligation is imposed on those the Central Government 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.¹⁷⁵

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.¹⁷⁶

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.¹⁷⁷ Their mutual conflict is thus deemed an 'internal affair' of the Muslim community, in which non-Muslims should not interfere.

3.2.10 The Repentance of a Rebel

If a rebel surrenders and drops his weapons, he says something, which reflects that he feels guilty for his acts, and now he is giving up the rebellion ship, then *aadil* is not allowed to kill him.

¹⁷³ al-Sarakhsi, *al-Mabsoot*, Vol. 10, p. 140.

¹⁷⁴ The basis for this obligation is that, even after rebellion, the rebels are deemed to be Muslims. *Ibid.*, Vol. 10, p. 107.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ al-Shirazi, *al-Muabazzab*, 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 Matr al-Iqna', 'Alam al-Kutub, Beirut, 1983, Vol. 6, p. 164.

The purpose of fighting with him was to divert him from fighting, and repent him; through his surrender the aim has been achieved. Therefore, his status will be like a non-Muslim fighter who converted to Islam. Moreover, the reason of fighting with him was to be safe from his bad intentions and activities, and when he surrendered, this evil was vanished.¹⁷⁸

¹⁷⁸ *Ibid.*

CONCLUSIONS

The details describes in the last two chapters show that there are additional rules prescribed by the *Shariah* for the conduct of hostilities in internal armed conflicts.

Ignoring the issue of who is right and who is wrong, focusing on the obligations of those rules, which are compulsory and all Muslims are obliged to follow those prescribed rules. These rules have been mentioned above in different places in different shapes, but here I will try to present it in a summary to get a clearer picture of the rules prescribed for the conduct of hostilities in general and then specifically those rules, which are applicable in those wars, which are being fought amongst Muslims.

General Rules for the Conduct of Hostilities

Some rules of conducting hostilities are compulsory for all Muslims, no matter who is fighting with them, Muslims or non-Muslims. Among those some important are as follow.

1. Attack on women, children and those who do not take part in the hostilities, is prohibited.
2. Mutilation and disgrace of dead bodies is illegitimate.
3. Obeying the rules of the treaties is obligatory, whether it is a peace treaty or it is a treaty for the conduct of hostilities.
4. The ways of killing or hurting the enemies, must be least painful.
5. Avoiding of genocide (mass killing) is obligatory.
6. Unnecessary damage to crops and building is illegal.
7. During fighting, to make thorough fares and high ways unsafe for people is illegal.
8. Disturbance and disorder is not allowed and Muslims are obliged to fight under a disciplined way of one commander.

9. No body will be punished for acts of others, however, commander will be held responsible for the acts of his subordinates, to the extent where it comes the rules of the law. Similarly, for subordinates it is illegal to obey the orders of their commander, which are against the *shariah*.
10. *Ruses of war* is allowed but *perfidy* is not allowed in any case, so it is completely illegal that a person pretends himself as non-combatant, and when the opposite party trusts him and do not attack and then he attacks them.
11. Committing suicide is not allowed even during the time of war, due to this reason commitment of all such acts are illegitimate, which leads to the death of the person.
12. During war if an innocent person is being killed by mistake, then the killer would pay *diyat*, and the same rule is for *arsh* and *daman*.
13. If non-combatants participate in fighting then they can be killed during fighting. However, it is illegal to kill them after fighting is finished, even if they have participated in the fighting.
14. As in the modern world, treaties have been made that war prisoners should be freed at the end of war, so except some specified circumstances it is illegal to give them death penalties or to enslave them. Because, these treaties are binding on Muslims according to *shariah*.
15. Based on these rules it is invalid to take prisoners as hostages.
16. To kill the hostages, is invalid according to these treaties and not because of these treaties but according to the principles and texts of *shariah*.
17. If a Muslim is in custody of enemies, and he is asked to kill another Muslim or help someone to kill an innocent person, he is strictly not allowed to do so. Similarly, he is not allowed to commit suicide or commit any act, which would be similar to suicide.

18. If a party disobeys the principles of *shariah* even then the other party has to obey these principles. However, those acts not forbidden by *shariah* but the treaty declared as forbidden, and then the execution of those rules will be valid until treaty is intact. Therefore, if one party commits any of these acts then other party is also allowed to commit these acts.
19. Some acts are not permissible in normal circumstances or situations. However, if some one receives threats of killing or of injury then for him the commission of those acts gets the green light of permissibility. However, some acts remain prohibited even under of state of coercion. Like killing innocent person, disgracing a women.
20. Similarly, some acts become permissible in the time of necessity but some acts remain prohibited even in times of necessity. For example, killing an innocent person is not allowed in any case. One can eat from someone's property in necessity without the permission of the owner, but afterwards he has to give *dhaman*.

Special Rules for the Conduct of Hostilities When All the Factions are Muslims

1. First, all the Muslims should try to stop the war between two groups of Muslims.
2. The combatants who are wounded or those who are *hors de combat* due to any reason; they must not be followed, only in one case if there is a danger of their reunion with other combatant groups.
3. Similarly, a prisoner should not be killed, but if his group is remaining and there is a threat that after releasing him he would join his group, then he may be killed.
4. The non-combatants of Muslims, if they participate in the hostilities, then during hostilities they might be killed. However, after the end of hostilities, they cannot be killed nor they can be enslaved.
5. Muslim women cannot be enslaved.
6. The wealth of a Muslim cannot be considered as booty in any case. It should be returned to the owner. During the hostilities it should be kept as *amanah*, but if there is a danger that it might be lost or damaged, then it has to be sold and the price should be kept as *amanah* for that person.
7. To take money from Muslims for a peace treaty is illegitimate.
8. Muslims will respect the dead bodies of each other and will bury the dead bodies with respect and dignity.
9. If the fighting groups have command and authority over a specific area and they consider themselves as the right group, then in case of hostilities if they cause some damage to a person or property, the rules of *qisas*, *diyyat*, *arsh* or *dhaman* will not be applicable. However, if a group lacks *man`aa* or *tav`il*, then all these rules will be applicable.
10. If the combatant surrenders, then killing him will be illegal.

11. If one group has signed a peace treaty with non-Muslims, then that is to be obliged by the second party as well. But, if they have the condition with non-Muslims in that treaty that they will support this group against the other group, then the other group is allowed to fight with these people as they would fight with ordinary non believers or aggressors.
12. The fighting groups of Muslims should not seek the help of non-Muslims against each other, and if the command is in non-Muslims hand, then it is strictly forbidden.
13. If some non-Muslims are attacking one of the fighting groups of Muslims, the other group will not help the non-Muslims in any case, rather they are supposed to help the Muslims.
14. If a person of one group has left something behind him in the territory of the other group, he is still the owner of his belongings. Similarly, he will not be stopped to meet his family.
15. If a person from a group of *man`aa* and *tav`il*, kills his relative from the other group, he will not be deprived of his legacy, provided that he considers himself on the right path.

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