THE ISLAMIC LAW OF REBELLION AND ITS POTENTIAL TO COMPLEMENT PUBLIC INTERNATIONAL LAW ON THE USE OF FORCE

Mohamed Elewa Badar* and Mohammad Z Sabuj**

Abstract: Political interest in territorial integrity and state sovereignty has always been to the fore in decisions made by governments faced with those who rebel. Thus, rebellion has been situated as an integral part of internal armed conflict rather than expanding it as part of external or international armed conflict. In this way, public international law has not only limited its scope of application but also failed to provide an effective legal framework for rebels who are not categorised as a party to international armed conflict. The enormous political support for "state sovereignty" and lack of necessary political will to recognise the right of rebellion at international level has played a vital role in this failure.

Attempts to overcome the failure have never been effectively successful due to the fear of ruling authorities that recognition of the right of rebellion might provide legitimacy to opponents and put their authority at risk. The political power has always triumphed over the necessity to recognise the right of rebellion and this has resulted in the under-development of this area of law. Furthermore, the rebels have denied their accountability for asymmetrical use of force against state authorities based on their disadvantageous position under public international law. This unequal position between rebels and state authorities has created a "gap" in the current international legal framework.

Keywords: *Use of force; rebellion; persecution; self-determination; Islamic law; public international law; international humanitarian law*

I. Introduction

This paper conducts a comparative analysis of Islamic law of rebellion and public international law on the use of force. It begins with a discussion of the law of rebellion in Islam followed by a detailed account of its potential to complement public international law in relation to use of force. The detailed account includes a historical overview of Islamic law

* Mohamed.Badar@northumbria.ac.uk. Professor of International and Comparative Law, School of Law, Northumbria University, Newcastle, UK.
** Md.Sabuj@rhul.ac.uk. Barrister-at-law (Lincoln's Inn) and Lecturer in Law, School of Law, Royal Holloway University of London, UK.

of rebellion and a systemic exposition of its relationship with international humanitarian law. It also includes an evaluation of the status and treatment of rebels during the post-charter legal framework that is adopted by the Geneva Conventions and its Additional Protocols. This paper evaluates the overall effect that arbitrary categorisation of rebels into combatants, non-combatants and unlawful combatants has on the justification to use excessive and asymmetrical force. It will argue that Islamic law of rebellion has a crucial role to play in the evolution of public international law on the use of force.

Islamic law prohibits terrorism[1] but permits rebellion against internal authority i.e., government, in order to "enjoin good and forbid evil".[2] Some jurists used this notion to argue that a ruler must enjoin the good and forbid the evil by suppressing any rebellion, thus protecting the nation from the disorder and instability introduced by rebels.[3] Whereas some scholars have used this Qur'anic source to argue the right of the ruler to suppress rebellion,[4] other scholars have used a hadith source to argue rebellion as legitimate against unjust rulers.[5] For instance, there is a *hadith* from the Prophet Muhammad that "if people see an oppressor and they do not oppose him then God will punish all of them".[6] However, these arguments of Islamic scholars neither prohibit rebellion nor its suppression. As a result, currently scholarly position on rebellion provides a platform for critical analysis of this branch of law. This platform, which has been set up by the classical Muslim jurists, has progressed further and developed a special branch of Islamic law of rebellion.

[1] For "terrorism" see below.

[2] Al-Qur'an 3:104, 9:71, 9:112, 22:41, 3:114, 7:157, 9:67, 31:17. Abu Yusuf Translation. The principle of 'enjoining what is right and forbidding what is wrong' (*al-amr bi'l-ma'ruf wa'l-nahy 'an al-munkar*) as reiterated in verse 3:110 is considered as 'a cardinal Qur'anic principle which lies at the root of many Islamic laws and institutions', see Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Texts Society, Cambridge, 2010), 28. See also Michael Cook, *Forbidding Wrong in Islam* (Cambridge University Press, Cambridge, 2003). In a recent case before the International Criminal Court the accused relied on the principle of *al-amr bi'l-ma'ruf wa'l-nahy 'an al-munkar* as a justification for the destruction of cultural property in Mali, see Mohmed Elewa Badar and Noelle Higgins, 'Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law – The Case of Prosecutor v. Al Mahdi' (2017) 17 International Criminal Law Review 486-516.

[3] al-Buhuti, *Kashaf al-Qina an Matn al-Ina*, vol 6 (Riyad: Maktabat al-Nasr al-hadithah, n.d.) 158.

[4] Ibid.

[5] Zahiri Ibn Hazm, *al-Muhala*, vol 11 (Beirut: al-Maktab al-Tujari, n.d.) 98. The classification between "just and unjust" rulers lies on their recourse to force. For instance, a ruler is unjust if he commands persecution (*fitna*) to oppress his subjects who are weak and helpless (*al-mustadafin*).

[6] Abi Zakariya al-Nawawi, *Riyadd al-Salihin* (Beirut: Dar al-hadith, n.d.) 109.

Rebellion is classified exclusively as an internal matter of a state as opposed to an external matter in public international law.[7] This position has hindered the development of an effective legal framework in the corpus of public international law in relation to rebellion. However, the implementation of Islamic international law and its scholarship on the matter in Muslim majority states could have a positive impact on international law in this regard, since it would create a legal framework that would not only apply at domestic level but would also create a uniform state practice of these states when it comes to rebellion. Such state practice could eventually lead to the recognition of certain concepts as customary international law. This does not of course preclude the option of signing an international treaty incorporating some basic principles on the status of rebels before the law, not only between Muslim majority states but on a broader level.

However, strong political support for "state sovereignty" and lack of political will to recognise the right of rebellion at international level has so far played a vital role in preventing this from materialising. The attempts to overcome the hindrance have never been successful due to the fear of the ruling authorities that recognition of the right of rebellion might provide legitimacy to their opponents and put their authority at risk.

In these circumstances, public international law and Islamic law have developed separate legal principles to deal with rebellion. Whereas international law has failed to develop a body of effective legal principles, Islamic law has failed to continue the enforcement of the legal principles that emerged in its early development period. Thus, these two legal systems have created a 'gap' in terms of the legal principles that apply to rebels. The existence of this gap is significant due to the fact that all the subjects of these two legal systems are not regulated by the same legal framework and this difference has resulted in a legitimacy-deficit because they are incapable of operating as a single legal framework by complementing each other. Furthermore, this gap has created a way for terrorists to claim legitimacy of their violent use of force based on their own-invented ideologies. Therefore, it is of vital importance to fill this gap so that these two legal frameworks can complement each other and operate as a single body of laws.

[7] Antonio Cassese, *International Law*, (2nd edn., Oxford University Press, 2005) 429; *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 127; See also Mark Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, (New York: I.B. Tauris, 2013), pp 353, xiv, 187.

In the task of filling this gap, Islamic law has a vital role to play and this is because it has developed a far-reaching body of laws to regulate rebellion. However, the most important task is to examine the nature and extent of this gap followed by the identification of any barrier that could potentially hinder the complementarity of these two systems and finally finding a way to overcome any such potential hindrance.

This article is structured in the following manner: Section II conducts a historical examination of the Islamic law of rebellion; Section III provides a historical overview of rebellion in public international law; Section IV provides an overview of the modern legal framework of rebellion in international law; Section V focuses on differences between Islamic law and public international law in relation to the status and treatment of rebels; Section VI considers how Islamic law of rebellion may complement international humanitarian law.

II. What is the Islamic Law of Rebellion?

Rebellion, in Islamic Law, is defined by the noun *baghy* (pl. *bughāh*) which literally means injustice or transgression.[8] Unlike the common belief among the vast majority of Muslim scholars at present, surprisingly the term here does not carry any derogatory or negative connotations, as maintained by the Shafʻi jurists,[9] nor does the act of rebellion constitute a sin, as believed by Ibn Taymiyyah (d. 1328).[10] The jurists used the term *bughāh* for rebels because it referred to one of the conflicting parties in the Qur'anic text addressing the law of rebellion. The jurists of the four schools of Islamic law define rebels as: "a group of Muslims that possesses some power and organisation (*shawkah, manʻah, fayʻah*) and that gathers, under the command of a leader, to fight against a ruler claiming, whether rightly or wrongly, that they have a *ta'wīl* (just cause, plausible interpretation) for their rebellion, secession or non-compliance with an obligation".[11]

[8] Abu al-Fadl Muhammad Ibn Manzur, *Lisan al-Arab* (Cairo: Dar al-Maʻarif n.d.) 11: 816; Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011) 150.
[9] Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifah Maʻānī Alfāẓ al-Minhāj*, vol 4, (Beirut: Dār al-Fikr, n.d.) 124; see also Muḥammad ibn Abī al-ʿAbbās Aḥmad ibn Ḥamzah al-Ramlī, *Nihāyah al-Muḥtāj ilā Sharḥ al-Minhāj*, vol 7 (Beirut: Dār al-Fikr, 1984) 402.
[10] Ibn Taymiyyah, *Al-Khilāfah wa al-Mulk* (Jordan: Makhtab al-Manar, 1994) 89.
[11] For classification between "just and unjust" rulers see (n.6). See also Ahmed Al-Dawoody (n.9) 150; ʿAbd al-Qādir ʿAwdah, *Criminal Law of Islam*, vol I (Zakir Aijaz tr, New Delhi: Kitab Bhavan, reprint

Despite the fact that the justification for rebellion is invalid from the perspective of the majority of Muslims, classical Muslim jurists explain that the *bughāh* are excused because, from the perspective of the *bughāh*, they think that their actions are justified.[12] Whereas Ibn Taymiyyah has claimed that the term *bughāh* does not mean that rebels have committed a sin but fighting against them is permitted in order to prevent their harm to security and stability.[13] The Hanafi (a school of thought within the Sunni sect which majority of the Muslims adhere to) position maintained that the rebels were sinners.[14] There are also disagreements among Muslim jurists about whether anyone would qualify for their status as *bughāh* for rebellion not only against an unjust ruler but also against a just ruler.[15] This uncertainty has also worked well for rulers in refusing to recognise the status of rebels in Islamic law.[16] However, this uncertainty does not have any significant role to play in identifying the rebels because both rebels and rulers are keen to justify themselves as just and legitimate. Hence, as long as their cause is just and legitimate people may rebel against their ruler and similarly a ruler may supress rebellion only if it is not just and legitimate.

In this situation, the dilemma between the proponents and opponents of rebellion in Islamic law has been a contentious issue. If a right of rebellion is permissible in Islamic law then people cannot legitimately use the right to rebel if the ruler has a legitimate right to use force to end rebellion. Therefore, it is necessary to conduct a theoretical analysis of the right of rebellion and the authority of the ruler to use force to supress any rebellion. A reconciliation of this dilemma is a necessary precondition for understanding the potential of Islamic law of rebellion to complement public international law.

There are two ways to reconcile the issue raised in the dilemma, namely (a) by analysing every incident of rebellion as an individual case; or (b) by analysing the law of rebellion in Islam. The issue with the first option lies in the fact that individual analysis of incidents of rebellion would not effectively address the issue raised in the dilemma. This is

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2005) 113 f.; F.A. Klein, *The Religion of Islam*, 1st paperback ed. (London: Curzon Press, 1985), p. 182.

[12] Ahmed Al-Dawoody (n.9) 150.

[13] Ibn Taymiyyah (n.11) 89. This position has also been supported by Hanbal'i jurists.

[14] Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press, 2001) 238.

[15] Abu al-Hasan al-Mawardi, *al-Hawi al-Kabir Sharh Mukhtasar al-Muzani* (Beirut: Dar al-Kutub al-Ilmiyya, 1994) XIII: 97; see also Ahmed Al-Dawoody (n.9) 151.

[16] Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (Oxford University Press, 2006) 52.

because the piecemeal fashion of analysis of a rebellion would only respond to a particular incident, and hence be likely to create many categories of rebellion and their legitimacy. On the other hand, the second option would not only generalise the law of rebellion in Islam but would also be conclusive on the legitimate position of the right to rebel and its corresponding resistance by the rulers. The following section discusses the law of rebellion in Islam and addresses the question 'where does legitimacy of rebellion lie?' In this discussion, the authors have adopted a comparative approach in the analysis of sources of Islamic law, history of rebellion in Islam, and state practice adopted by the Caliphs, rulers, and rebellions in early Islamic history.

A. Islamic law of rebellion

Rebellion (*bughāh*) in Islamic law regulates the circumstances in which use of force is allowed against the rulers of an Islamic state and the treatment of rebels by the rulers. In addition to the Qur'anic resource referred above, Islamic scholars have argued legitimacy of rebellion against unjust rulers on the basis of their own exegesis.[17] They have come to this conclusion on the basis that whereas it is obligatory for every Muslim to obey their rulers[18] as the latter have the duty to maintain stability[19] and order in the state, if they give sinful commands to their people, such obligation ceases and Muslims have the right to disregard the rulers and fight them.[20] These scholars also emphasise that the right to rebel emanates from

[17] Ibn Taymiyyah (n.11) 12; Mohammad Rashid Rida, *Tafsir al-Manar*, vol 6 (Cairo: Matbaʿah al-Manar, 1923) 367; Muhammad Abu Zahrah, *Al-Jarimah wa al-Qqubah fi al-Fiqh al-Islami* (Cairo: Dar al-Fikr al-Arabi, 1998) 130; Zahiri Ibn Hazm (n.5) 98; see also James Turner Johnson and John Kelsey (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 151.

[18] Al-Qur'an 4:59, Abu Yusuf translation; See also Ahmed Al-Dawoody (n.9) 148; Muhammad Hamidullah, *Muslim Conduct of State* (5th edn, Lahore: Ashraf Press, 1968) 184; Majid Khadduri, *War and Pace in Islam* (Baltimore: John Hopkins Press, 1990) 78; Abdulrahman Alsumaih, "The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought", PhD thesis, University of Newcastle Upon Tyne (1998) 91.

[19] Al-Qur'an 49:9-10. Abu Yusuf translation; see also James Turner Johnson and John Kelsey (eds) (n.18) 152.

[20] Ibn Taymiyyah (n. 11) 12; Mohammad Rashid Rida (n.18) 367; Muhammad Abu Zahrah (n.18) 130; Zahiri Ibn Hazm (n.6) 98; See also Muhammad Hamidullah (n.19) 184; Bernard Lewis, *Islam in History: Ideas, Men and Events in the Middle East* (London: Alcove Press, 1973) 256; Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, vol 36 (Oxford University Press, 1981) 313; Khaled Abou El-Fadl, "Political Crime in Islamic Jurisprudence and Western Legal History" (1998) 4 U.C. Davis Journal of International Law and Policy 11, 14.

the Qur'anic command to "enjoin good and forbid evil"[21] and this right has also been established in a Prophet's *Sunna* where he is reported to have said that:

> To hear and obey the ruler is obligatory, so long as one is not commanded to disobey God for if one is commanded to disobey God, he shall not hear or obey.[22]

On the contrary, with regards to the right of rebellion against rulers, while the Qur'an does not explicitly command rebellion against unjust rulers, the following Qur'anic verse creates a powerful symbolic construct to justify rebellion:

> Would not you fight in the way of Allah for *al-mustadafin* (the oppressed socially weak Muslims) from men, women and children who pray: Our Lord! Take us from this city of the oppressive people and appoint for us from Your side a guardian and appoint us from Your side a protector.[23]

In addition to the Qur'anic support for rebellion stated above, there is the practice and conduct of many of the Prophet's companions and several of the early jurists who took part in, supported or sympathised with, a variety of rebellions. These counter-traditions represent tendencies or trends in early legal opinions but did not develop as systematic positions.[24] For example, some versions of these traditions stated that a ruler should be obeyed as long as he implements the book of God, or in some versions, as long as he leads Muslims in accordance with the book of God.[25] Other reports make the duty of blind obedience applicable only in the time of the Prophet.[26] A set of widely cited traditions explicitly states that a ruler should not be obeyed if he commands a sin, or that he should be obeyed only to the extent that he commands what is good and just.[27] These traditions promote or encourage resistance to rulers

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[21] Al-Qur'an 3:104, 9:71, 9:112, 22:41, 3:114, 7:157, 9:67, 31:17. Abu Yusuf Translation.
[22] Ahmad Ibn Hajar al-'Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari* (Beirut: Dar al-Fikr, 1993) XIV: 121.
[23] Al-Qur'an 4:75, Abu Yusuf translation.
[24] Khaled Abou El Fadl (n.15) 120.
[25] Abu Bakr al Shaybani, *Kitab al-Sunnah* (Beirut: al-Maktab al-Islami, 1993) 492; Ahmad Ibn Hanbal, *Musnad* (Beirut: al-Maktab al-Islami, 1993) VI:451; Abu al-Husayn Muslim b. al-Hajjaj, *Al-Fami' al-Sahih* (Beirut: Dar al-Maʿrifa, n.d.) VI: 15; 'Abu Abd Muhammad Ibn Maja, *Sunan* (Beirut: Dar Ihya' al-Kutub al-'Arabiyya, n.d.) II:955; Abu al-'Abbas al-Qastalani, *Irshad al-Sari Sharh Sahih al-Bukhari* (Cairo: Dar al-Fikr 1304 AH) X:170; see also Aksi Muhyi al-Din al-Nawawi, *Al-Majmu' Sharh al-Muhadhdhab* (Beirut: Dar al-Fikr n.d.) XII: 468.
[26] Ahmad Ibn Hanbal, *Musnad* (n.26) II:279.
[27] Sulayman Abu Dawud, *Sunan* (Cairo: Dar al-Hadith 1988) IV: 94; Abu Bakr Ahmad al-Bazzar, *Al-Bahr al-Zakhkhar* (Medina: Maktabat al-'Ulum wa al-Hikam, 1988) II:204; Abu al-Husayn Muslim b. al-Hajjaj (n.26) VI:15; 'Abu Abd Muhammad Ibn Maja (n.26) II:956.

in one form or another. A common form of this genre states that the best form of *jihad* is a word of truth spoken before an unjust ruler.[28] Moreover, Caliph Ali reportedly said that if the Kharijites[29] rebel against an unjust ruler then Muslims should not fight them because in this situation they may have a legitimate cause for their rebellion.[30]

From the exegetical point of view, the Islamic law of rebellion is founded and developed on the Qur'anic text as well as the *Sunna* of the Prophet. However, the history of rebellion in Islam suggests that it began following the death of the Prophet Muhammad in 632CE.[31] Therefore, the law of rebellion in Islam has been developed in precedents of the Caliphs, rulers and rebellions that took place during the early Islamic history.[32] During this time, rebellion in Islam took place in response to the alleged oppression and persecution of

[28] Abu Isa Muhammad al-Tirmidhi, *al-Fami' al-Sahih* (Cairo: Dar al-Hadith, 1987) IV: 409.

[29] 'The Kharijites [or Khawarij] were the first identifiable sect of Islam. Their identity emerged as followers of [Prophet] Muhammad attempted to determine the extent to which one could deviate from ideal norms of behaviour and still be called Muslim. The extreme Kharijite position was that Muslims who commit grave sins effectively reject their religion, entering the ranks of apostates, and therefore deserve capital punishment. This position was considered excessively restrictive by the majority of Muslims, as well as by moderate Kharijites, who held that a professed Muslim could not be declared an unbeliever (*kafir*). The Kharijites believed it was forbidden to live among those who did not share their views, thus acquiring the name by which they are known in mainstream Islamic historiography—*khawarij* means "seceders" or "those who exit the community." Radical Kharijites, on the other hand, declared those who disagreed with their position to be apostates, and they launched periodic military attacks against mainstream Muslim centres until they ceased to be a military threat in the late 8th century CE.' See Tamra Sonn and Adam Farrar, 'Kharijites' in Oxford Bibliographies available at < https://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0047.xml> (accessed 26 July 2019).

[30] 'Abd Allah Muhammad Ibn Abi-Shayba, *Al-Musannaf fi al-Ahadith wa al-Athar* (Beirut: Dar al-Fikr, 1989) VIII: 737. It is to be noted that 'during the fourth Caliph 'Ali's reign (656-661 CE), the Khawarij and Shi'a movements split from the Sunni majority. The Battle of Siffin (657 CE) had pit- ted Mu'awiya, the then governor of Syria, against 'Ali, with the former charging 'Ali with not bringing the third Caliph Uthman's killers to justice. However, 'Ali refused to fight his Muslim brothers, and so they agreed to settle their dispute through arbitration.41 A civil war nevertheless ensued, as 12,000 of 'Ali's sup- porters (who subsequently became the Khawarij) disagreed with settling the matter by means of human arbitration. They contended that 'Ali should have turned to divine judgement and applied the law of retaliation, as prescribed by the Qur'an.42 Citing their slogan *la hukma illa lillah* ('Authority belongs to God alone'), the Khawarij called upon all Muslims to follow the Qur'an to the letter. This was the first occurrence in Islamic history of a sect appropriating the right to declare *takfir* against fellow Muslims, and the rise of the Khawarij.' See Mohamed Elewa Badar *et al*., 'The Radical Application of the Islamic Concept of *Takfir*' (2017) 31 Arab Law Quarterly 134, at 142

[31] Ahmed Al-Dawoody (n.9) 147.

[32] Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū': Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī (Beirut: Dār al-Fikr, 2000), Vol. 20, p. 337; ʿAlī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Ḥāwī al-Kabīr: Fī Fiqh Madhhab al-Imām al-Shāfi'ī Raḍī Allah 'anh wa huwa Sharḥ Mukhtaṣar al-Muznī*, (ed.) ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999), Vol. 13, p. 104; see also Ahmed Al-Dawoody (n.9) 149.

the ruling authorities.[33] As a result, oppression or persecution (*fitna*) has been one of the fundamental principles of use of force in Islamic law.[34] Thus, it is incumbent on Muslims to fight any oppression or persecution.

As spreading *fitna* is prohibited in Islam,[35] any rebellion which has the potential to cause *fitna* within the community is prohibited and this is consistent with the prohibition of rebellion against the rulers. This prohibition against *fitna* suggests that, it is not limited to particular conflicts that took place in Islamic history, but extends to prohibit any situation that might result in a *fitna*.[36] Likewise, it is not the Kharijites, as a specific historical entity, that are reprehensible, but any other group that follows in its footsteps.[37] In other words, *fitna* is not limited to the use of force by or on behalf of the Kharijites who were responsible for spreading this within Islamic community but also included other groups which had recourse to force for the same purpose. This principle justifies the use of force to end oppression or persecution caused by rebellion.[38] However, if the ruler spreads *fitna* then it is incumbent on Muslims to end that *fitna*, if necessary, by rebellion. Furthermore, from the Qur'anic exegetical viewpoint use of force is allowed to end persecution and the persecution can come from the ruler as well as the rebels.[39] Therefore, in Islam both the rebels and rulers have the reciprocal right to use force to end oppression or persecution.

The above discussion suggests that reconciliation between the right to use force by rebels and rulers to supress rebellion is irreconcilable. While Muslim jurists were not willing to endorse or legitimate all rebellions without limits, they also were not willing to give rulers unfettered discretion in dealing with rebels.[40] As a result, legitimacy of use of force by and against rebels in Islamic international law moved from "*jus ad bellum*" to "*jus in bello*". Whereas, "*jus ad bellum*" denotes the legitimate right to use force by and against rebellion, "*jus in bello*" denotes legitimate methods of use of such force.[41] In other words, on the one

[33] 'Abd Allah Muhammad Ibn Abi-Shayba (n.31) VIII: 622; see also Abu Bakr al Shaybani (n.26) 507.
[34] '*Fitna*' has been adopted in this article to mean 'persecution'.
[35] 'Abd Allah Muhammad Ibn Abi-Shayba (n.31) VIII: 622; see also Abu Bakr al Shaybani (n.26) 507.
[36] Khaled Abou El Fadl (n.15) 118.
[37] Jeffrey T. Kennedy (n.17) 31; see also Khaled Abou El Fadl (n.15) 118.
[38] Hasan Isma'il al-Hudaybi, *Du'ah..la qudah* (Cairo: Dar al-Tiba'a wa'l-Nashr al-Islamiyya, 1977) 58.
[39] Syed Imadoud-Din Asad, 'Islamic Humanitarian Law' cited in M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press, 2014) 166.
[40] Ahmed Al-Dawoody (n.9) 157.
[41] Hilmi M. Zawati, "Jus in Bello: Civilians' Fundamental Rights under Islamic and Public International Law" in M. Cherif Bassiouni and A. Guellali (eds), *Jihad and Its Challenges to International and Domestic Law* (The Hague: Hague Academic Press, 2010) 167; see also Mohamed Badar, "Ius in Bello under Islamic International Law" (2013) 13(3) International Criminal Law Review 593.

hand "*jus ad bellum*" determines the right of rebels to recourse to force, on the other hand "*jus in bello*" determines the extent of the right. For example, "*jus ad bellum*" decides if the rebels have a legal right to use force in the course of their rebellion, and "*jus in bello*" determines the nature and extent of the use of force by rebels in the course of their rebellion and by the rulers in the course of preventing the same.

The following section undertakes a comparative analysis of the use of force (*jus in bello*) between public international law and Islamic international law in relation to rebellion. The section begins with an overview of use of force by and against rebels in public international law followed by a critical analysis of this use of force in comparison to Islamic international law.

B. The potential of Islamic law of rebellion to complement Public international law on the Use of Force

Despite several attempts to regulate the use of force by and against rebels by bringing it within the international legal framework,[42] it has not been possible to provide an effective legal framework for rebels to exercise their right, within the bounds of their legal responsibilities. The political interests based on "state sovereignty" have been unable to take a course towards providing an effective solution to the use of force issues in rebellion. The political power has always triumphed over the necessity to recognise the right of rebellion and this has resulted in the under-development of this area of law. Furthermore, the rebels have denied their own accountability for asymmetrical use of force against state authorities on the basis of their disadvantageous position under international law on the use of force.

Their disadvantageous position lies in the fact that rulers are not accountable for their use of force against rebels. As the rulers are not accountable to any international legal framework for their use of force against rebels under the political umbrella known as "sovereignty", the rebels' denial of accountability for their use of force against the ruling authorities makes the latter's claim a very strong one. This claim becomes even stronger when the rebels are categorised or labelled as terrorists by the rulers, without offering any justification, legal or factual. In these circumstances, the asymmetric use of force by rebels against the rulers, such as kidnapping government officials in retaliation against extra judicial killing of rebels by the state, often win sympathy and support of the civilian population.

[42] See Section under the title "The status of rebels in Public International Law" below.

III. Historical overview of Rebellion in Public international law

The right of revolution was accepted by several societies from ancient Greece and Rome and was also accepted by early international law scholars such as Grotius and Vattel.[43] The issue of rebellion gained further attention from the Second Scholastica.[44] One of the strongest proponents of the right of rebellion was the Spanish theologian Fr Jean de Mariana. Indeed, as is seen in his work *De Rege et Regis Institutione*,[45] Mariana was in favour of tyrannicide in situations of political repression.[46] The use of force to overthrow tyranny could be considered a type of "Just War", or justifiable war.[47] Thomas Aquinas was of the view that a public rising against the government for the common good was not sedition.[48] While multifarious examples of what constituted a Just War have been suggested from the Early Christian period onwards, [49] Aquinas, in the 13th century in his work *Summa Theologiaie,* proposed a number of just war criteria. A war was just if (1) it was waged under a proper authority, (2) it had a just cause and (3) the belligerents had the right intention, i.e. they must intend to promote good and subdue evil.[50] Historically, however, international law was slow and hesitant to engage with the issue of rebellion.[51]

This positive view of rebellion gained more support with the rise of the sovereign state system, in tandem with the emergence of the theories of the social contract and natural law.[52]

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[43] Jordan J. Paust, "The Human Right to Participate in Armed Revolution and Related Norms of Social Violence: Testing the Limits of Permissibility" (1983) 32 Emory LJ 561.
[44] R. Ariew and D. Gabbay, "The scholastic background" in D. Garber and M. Ayers (eds), *Cambridge History of Seventeenth Century Philosophy* (Cambridge University Press, 1998) 15.
[45] This text is available at: <https://books.google.ie/books?id=Whk8AAAAcAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false> (visited 14 March 2017).
[46] Harald E. Braun, *Juan de Mariana and Early Spanish Political Thought*, (Aldershot; Burlington, VT: Ashgate, 2007) 44.
[47] Thomas Aquinas, *Selected Political Writings* (J.G. Dawson tr, Oxford: Basil Blackwell, 1948) 159.
[48] Thomas Aquinas, *Summa Theologica* (Treatise on the Theological Virtues) Quest 42, Art 2; see also James Turner Johnson, "Historical Tradition and Moral Judgment: The Case of Just War Tradition" in Alex J. Bellamy (ed), *War: Critical Concepts in Political Science*, vol IV (Routledge, 2009) 23.
[49] Inis L. Claude Jr, "Just Wars: Doctrine and Institutions" (1980) 95 Political Science Quarterly 83, 87.
[50] St Thomas Aquinas (n.47) Quest 42, Art 2; Just War Theory, Internet Encyclopaedia of Philosophy <http://www.iep.utm.edu/justwar/> (visited 14 March 2017); see also Ahmed Al-Dawoody (n.9) 158.
[51] Ignacio De La Rasilla Del Moral, "Medieval International Law" in Oxford Bibliographies in International Law, available at: <http://dx.doi.org/10.1093/obo/9780199796953-0112> (visited 14 March 2017).
[52] Hall Gardner and Oleg Kobtzeff, "General Introduction: Polemology" in Hall Gardner and Oleg Kobtzeff (eds), *The Ashgate Research Companion to War: Origins and Prevention* (Ashgate, 2012) 7; see also Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Leiden; Boston: M. Nijhoff Publishers, 2006) 9.

For example, Locke, proposes an argument for legitimate rebellion in his work *Second Treatise of Government*.[53] Locke drew a distinction between legitimate governments, which seek to promote and preserve the rights of their citizens, and illegitimate governments which do not.[54] Legitimate governments deserve that their citizens behave well and remain peaceful.[55] Because illegitimate governments violate the rights of their citizens they put themselves in a state of war with their citizens, hence rebellion is legitimate.[56] Concerning this right of revolution, President Abraham Lincoln said:

> This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending, or their revolutionary right to dismember or overthrow it.[57]

The principle ignited by the American Revolution spread throughout Europe during the late 18th and 19th centuries[58] as a revamped version of the Just War theory,[59] whereby it was claimed that a state that denied the rights of the peoples it purported to rule was not fit to rule, and that certain actions of the state could give its citizens a just cause to revolt.[60] States continued, in the 19th and 20th centuries , to use the rhetoric of justice and justness when they used force against rebels but the justification produced no legal reverberations.[61] The newly created states following imperialism and colonialism were confronted with the challenge of legitimate government that governed the people for the common good. The people were often subject to tyranny and denial of their rights by the government. In these circumstances, the

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[53] This text is available at: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm.> (visited 14 March 2019).

[54] John Locke, *The Second Treatise of Government,* available at: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm.> (visited 14 March 2017); see also Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, "The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse" in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018) 309.

[55] Mohamed Badar, Ahmed al-Dowoody and Noelle Higgins, "The Origins", (n.55) 309.

[56] John Locke (n.55); see also Mohamed Badar, Ahmed al-Dowoody and Noelle Higgins, "The Origins", (n.55) 309.

[57] Abraham Lincoln, *First Inaugural Address* (March 4, 1861) - quoted in Henry J. Paust (n.42) 547-8. This is similar to Jean Jacques Rousseau's discussion of the State having a 'social contract' with its people - see *Social Contract* from 1762, translated by G.D.H. Cole, is available at: <http://www.constitution.org/jjr/socon.htm, last accessed 25/06/2014> (visited 14 March 2017). Many other political philosophers also considered the idea of the right of revolution - see, e.g. John Locke (n.55).

[58] Theodore S. Woolsey, "Self-Determination" (1919) 13 AJIL 13 302.

[59] Joachim von Elbe, "The Evolution of the Concept of the Just War in International Law" (1939) 33 AJIL 665; see also Michael Walzer, *Just and Unjust War* (New York: Basic Books, 2000) 5.

[60] Jordan J. Paust (n.44) 547.

[61] Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press, 2011) 69.

right to rebellion was at its highest peak. On the other hand, governments were also claiming their right to suppress rebellion on the basis of their sovereign power and legitimate authority.[62]

IV. The Modern Legal Framework of Rebellion: The Post-Charter Arrangements of Public International Law

Following the collapse of the League of Nations and the end of the Second World War, the UN Charter took the lead in promoting international peace and security.[63] The first post-Charter provision which officially recognised the right of rebellion was the Universal Declaration of Human Rights. It states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". [64] This position of the right of rebellion on the basis of human rights was further developed during the 1960s and 1970s.[65] The issues of colonialism and self-determination were linked together at the fore of the UN's agenda, with both the General Assembly and the Security Council adopting various resolutions on the topic, both general and country-specific. [66] However, these types of resolutions were too ambiguous to gain consensus.[67] For example, early General Assembly resolutions on Portuguese colonies and on the situation in Namibia affirmed the legitimacy of the struggle of the people in these territories but did not spell out the nature and extent of their right to use armed force.[68] This type of constructive ambiguity in resolutions is also evident in other UN resolutions on the issue of self-determination.[69] The ambiguity of the resolutions reemphasis

[62] Mark Jarrett (n.8) 187.
[63] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 EJIL 1, 5.
[64] Preamble, Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III), 1948; see also O. Schachter, "Just War and Human Rights" (1989) 1 PYIL 8.
[65] Michael Walzer (n.58) 2; see also Yoram Dinstein (n.62) 93.
[66] United Nations General Assembly Resolution 2105 (XX), 1965; see also R.E. Gorelick, "Wars of National Liberation: Jus ad Bellum" (1979) 11 CaseWRJIL 71.
[67] Christine Gray, *International Law and the Use of Force* (2nd edn, Oxford University Press, 2004) 53.
[68] GA Res 2707 (1970); 2652 (1970); and 3295 (1974) cited in Christine Gray (n.68) 62.
[69] See Resolutions reaffirming Resolution 2105: Resolution 2189 (XXI), 1966, 76:7:20; Resolution 2326 (XXII), 1967, 86:6:17; Resolution 2446 (XXIII), 1968, 83:5:28; Resolution 2465 (XXIII), 1968, 87:7:17; Resolution 2548 (XXIV), 1969, 78:5:16; Resolution 2383 (XXIII), 1968, 86:9:19; Resolution 2508 (XXIV), 1969, 83:7:20 on Southern Rhodesia; Resolution 2395 (XXIII), 1968, 85:3:15 on South Africa; Resolution 2547(XXIV) A, 1969, 87:1:23 on South Africa and Resolution 2403 (XXIII), 1968, 96:2:16 on Namibia. See also General Assembly Resolution 2708 XXV), 1970, 73:5:22; 2707 (XXV), 1970, 94:6:16, 2652 (XXV), 1970, 79:10;14.

the reluctance of the state parties to the UN to recognise the right of rebellion against their government or ruler.

While, General Assembly instruments do not go so far as to legalise the use of force by rebels, Western powers always vote against such resolutions[70] and so their value as a valid interpretation of international law is doubtful: a lack of support for the resolutions hinder the creation of customary international law.[71] It should be emphasised that while the right of a tyrant was denied in the international legal framework, the right to use force against such tyrant, in the form of a right of rebellion, has not been universally accepted. While the use of force to overthrow tyranny has utilised a "Just War" argument, such use of violence has regularly been condemned by Western states.[72] Therefore, in international law there is no unqualified right of rebels to use force to overthrow a tyrannical or despotic government.[73]

While support for the right of revolution under international law has waxed and waned over the years, it has never been fully and definitively codified as a legal principle.[74] In some contexts there is support for the legitimate use of force in rebellion in the context of fighting tyranny or serious human rights abuses and in furtherance of the right to self-determination.[75] However, these examples have never been fully endorsed by the international community by means of a legal instrument, although there is, as evidenced above, some scholarship and state practice to support this view. Therefore, the issue of *jus ad bellum* with regard to rebellion is filled with uncertainty,[76] and indeed, the rights and protections which attach to those who seek to rebel against the government were and still are, as we shall see below, vague and amorphous.

A. The status of rebels in Public International Law

[70] Voting records can be accessed at: <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=14895302KP9F6.25787&profile=voting&menu=search&aspect=history&histedit=last> (visited 14 March 2017).
[71] Nico Krisch, "More Equal Than the Rest? Hierarchy, Equality and U.S. Predominance in International Law", in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) 135.
[72] Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1988) 103.
[73] Antonio Cassese (n.8) 433.
[74] Heather Wilson (n.73) 22.
[75] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 377.
[76] James Turner Johnson, "Ideology and the Jus ad Bellum: Justice in the Initiation of War" in Alex J. Bellamy (n.49) 157.

Rebellion involves sporadic and isolated challenges to the government. The criteria of rebellion are vague and uncertain, and the term can cover many instances of minor violence within the borders of a state, ranging from violent protests to an easily quelled uprising. [77] Assistance from a third state is regarded as unlawful intervention and a third state is bound to respect the measures taken by the parent state for the suppression of the seditious party – for example a prohibition on the importation of war material bound for the rebels.[78] Rebellions fall within the exclusive remit of the sovereign state and no rights or duties accrue to the rebels, who can legally be treated as criminals under domestic law and do not enjoy prisoner of war status if captured.[79]

International humanitarian law, which is a special branch of public international law, also deals with rebellion. This branch of law regulates the treatment of rebels from an international perspective and determines the extent of the right of the ruling authorities to use force to suppress rebellion. What follows is an examination of the efficiency of this special branch of law in regulating rebellion.

B. The status of rebels under the Geneva Conventions and the Additional Protocols

International humanitarian law distinguishes between international and non-international armed conflicts, which are governed by different protective regimes.[80] Common Article 3 of the Geneva Conventions of 1949 is the only provision of the Conventions which deals with non-international armed conflicts. [81] This provision "marked a fundamental change in that the automatic applicability of the legal protection for rebels has been recognised by the

[77] Bert V.A. Röling, "The Legal Status of Rebels and Rebellion" (1976) 13 J. Peace Res 149; see also Philip C. Jessup, "The Spanish Rebellion and International Law" (1936-7) 15 Foreign Affairs 260.
[78] Antonio Cassese (n.8) 127.
[79] Richard A. Falk, "Janus Tormented: The International Law of Internal War" in James N. Rosenau (ed), *International Aspects of Civil Strife* (New Jersey: Princeton University Press, 1974) 185; see also Jean D'Aspremont, "Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents" (2009) 58 (2) International and Comparative Law Quarterly 427.
[80] Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) 247; see also Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford University Press, 2010) 2; Andrea Binachi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart Publishing, 2011) 24; Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts" in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012) 32.
[81] D. Elder, "The Historical Background of Common Article 3 of the Geneva Convention of 1949" (1979) 37 Case W Res J Int'l L 11; see also Emily Crawford (n.81) 2; Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts" in Elizabeth Wilmshurst (ed) (n.81) 50.

International legal framework."[82] This protective regime of International humanitarian law concerning non-international armed conflicts was extended in the form of Additional Protocol II.[83]

However, Common Article 3 and Additional Protocol II do not adequately protect rebels. Moreover, these provisions have created a "gap" in the legal protection for rebels involved in any conflict which does not meet the requirement of an armed conflict.[84] The "gap" that has been created by these legal provisions is outlined below.

It is quite apparent that Common Article 3 has provided international bodies such as the International Committee of the Red Cross (ICRC) with the right to intervene in situations of non-international armed conflict, but the rights and obligations of the parties involved in the armed conflict i.e., the state authority and the rebels, are very limited.[85] There has been no change in the rights and status of the rebels provided by Common Article 3 which is commonly regarded as the price demanded by delegates for the Article's adoption, addressing the fear that a government's capacity to suppress internal revolt would be interfered with.[86] Moreover, the application of the Article does not constitute any recognition by the government that the rebels have any authority; and rebellions may be suppressed and tried accordingly.[87]

Another weak point of Common Article 3 is that neither the means and methods of war nor the conduct of hostilities are limited.[88] In the absence of such limitation it is difficult to ascertain what level of violence will trigger its application and the extent of such application.[89] The ICRC's Commentary states that Common Article 3 should be applied as

[82] Hitoshi Nasu, "Status of Rebels in Non-International Armed Conflict" (2009) ANU College of Law Research Paper No. 10-71, 12.
[83] Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts" (1981) 30 International and Comparative Law Quarterly 416.
[84] Mohamed Badar, Ahmed al-Dowoody and Noelle Higgins, "The Origins", (n.55) 309.
[85] Antonio Cassese, "The Status of Rebels", (n.84) 419.
[86] L. Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 65; see also J. K. Kleffner, "From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Pace Conference" (2007) LIV NILR 315.
[87] L. Moir (n.87) 65; see also Commentary to Additional Protocol II, 1331, paras 4395-401.
[88] D. Elder (n.82) 11; see also Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict" (2005) 87 IRRC 175, 188.
[89] Jelena Pejic, "The protective scope of Common Article 3: more than meets the eye" (2011) 93 IRRC 189 cited in Mohamed Badar, Ahmed al-Dowoody and Noelle Higgins, "The Origins", (n.55) 309.

widely as possible,[90] but the level of violence needed to trigger the application of the provision is still unsettled.[91] In this situation, it is very unlikely that this Article will be triggered by violence which does not meet the requirement for "armed conflict".[92] For example, people caught up in incidents of violent and sustained riots may fall outside the protection remit of IHL. This issue was identified in *Prosecutor v Tadić* where the International Criminal Tribunal for the Former Yugoslavia aptly emphasised:

> The low threshold of violence required to trigger Common Article 3 was underscored by the Inter-American Commission on Human Rights in the *La Tablada* case (*Juan Carlos Abella v Argentina* (Case 11.137, 18 November 1997), at paras 155-156), where the Commission affirmed the applicability of Common Article 3 in situations of attacks by an armed group on Argentine military personnel, despite the very brief duration of the attacks. Rather, the Commission focused on the extensive planning behind the attacks and the nature of the violence. In determining that the armed confrontation at the *La Tablada* base and its recapture by the Argentinian army constituted an internal armed conflict and not mere "internal disturbance or tensions" the Commission excluded the following situations from the definition of armed conflict as they fall below the threshold: riots, that is to say, all disturbances *which from the start are not directed by a leader and have no concerted intent*; isolated and sporadic acts of violence, *as distinct from military operations carried out by armed forces or organized armed groups*; other acts of a similar nature which incur, in particular, mass arrests of persons because of their behaviour or political opinion.[93]

Since the adoption of Geneva Conventions in 1949, the face of conflict has changed over time and as non-international armed conflicts began to increase in number it was realised that the laws of war were in need of review and revitalisation.[94] Negotiations on how to amend

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[90] Jean Pictet, "The Principles of International Humanitarian Law' in Jean Pictet (ed), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva, 1952) 50; The ICRC has recently (March 2016) launched the first part of its new commentary on the Geneva Conventions, see at: <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument> (visited 15 March 2017).

[91] Rene Provost (n.81) 268.

[92] Asbjørn Eide, Allan Rosas and Theodor Meron, "Combating Lawlessness through Gray Zone Conflicts through Minimum Humanitarian Standards" (1995) 89 AJIL 89 215.

[93] *Prosecutor v Tadić* (n.8) (Appeals) para 70 [emphasis in original].

[94] Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (The Hague: Martinus Nijhoff, 2010) 104.

international humanitarian law took place during the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, which was convened between 1974 and 1977.[95] During drafting negotiations of Additional Protocol II, it was clear that States did not want to grant status and rights to rebels who were threatening their authority. Indeed, Cassese comments that:

> To grant rebels international rights and duties means that the divide between insurgents and the legal government has reached such a point that the former has a standing, albeit limited, in the international community.[96]

Cassese added:

> [T]o acknowledge that rebels are entitled to invoke international rules implies that they are outside both the physical and legal control of the national authorities. By contrast, to suggest that insurgents cannot rely on international law means that the only body of law applicable to them is domestic criminal law and consequently that the government in power is free from international constraint and can treat them as it thinks best.[97]

Similarly, as correctly argued in the Commentary to the Additional Protocols, "governments are reluctant to assume treaty obligations which require them to extend a license to domestic enemies to commit acts of violence against their personnel and objects which could be described as military objectives."[98]

The above discussion makes it clear that despite having identified the "gap" the Additional Protocol II has failed to narrow it but has in fact made it wider. This is because the threshold to trigger Protocol II was further raised rather than lowered. During the Geneva Conference, it was decided that the threshold of Protocol II should actually be raised from that of Common Article 3 because of a fear of an infringement of state sovereignty.[99] The Protocol only applies if the dissidents control some territory and have the ability to implement the Protocol. If, in the course of the conflict, the rebels lose this control or ability,

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[95] Mohamed Badar, Ahmed al-Dowoody and Noelle Higgins, "The Origins" (n.55) 309.
[96] Antonio Cassese, "The Status of Rebels", (n.84) 430.
[97] Ibid.
[98] Michael Bothe, Karl Joseph Partsch and Waldemar Solf (eds), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1997 Protocols Additional to the Geneva Conventions of 1949* (Dordecht: Martinus Nijhoff, 1982), 244, para. 2.1.
[99] Dietrich Schlindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols" (1979) 163 Recueil des Cours 148; see also Zakaria Daboné, "International Law: armed groups in a state-centric system" (2011) 93 IRRC 395.

the Protocol is no longer applicable. In this way, Protocol II provides for the very unsatisfactory position that "the question of applicability of Protocol II might be answered varyingly, according to the prevailing circumstances."[100]

In addition, Protocol II does not clearly state how much territory must be under the control of the non-government party to the conflict or what constitutes "implementation" of the Protocol by the rebel forces. It is clear that "much is left up to the discretion of the State, which is not a very acceptable position as states will be reluctant to compromise their state sovereignty, even for serious humanitarian concerns."[101]As observed by Leslie Green, Protocol II "has a threshold that is so high ... that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until rebels were well established and had set up some form of *de facto* government".[102] In this respect, it must also be noted that Additional Protocol II does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[103]

Unlike Protocol I, Protocol II does not confer either combatant or prisoner of war status on rebels. The Commentary to the Additional Protocols clarifies why this is the case:

> It seems unrealistic to establish combatant status for persons who have participated in hostilities and have been captured in non-international armed conflicts. In fact, such status would be incompatible, first, with respect for the principles of sovereignty of States, and secondly, with national legislation which makes rebellion a crime.[104]

Government authorities can still prosecute and sentence anyone who is found guilty of any offence which relates to the conflict, leading one scholar to comment:

> *Protocol II* has in effect restated the general rule of international law relating to the status of belligerency. Before a situation assumes such a status, the conflict is to be

[100] Dietrich Schlindler (n.100) 148.
[101] Noelle Higgins (n.95) 104; see also Medard R. Rwelamira, "The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949" in Christophe Swinarski (ed), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge - en honneur de Jean Pictet* (The Hague: Martinus Nijhoff, 1984) 227.
[102] Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press, 2008) 83.
[103] Additional Protocol II, Article 1(2).
[104] Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949* (Geneva: JCRC, 1949)1331-1333.

considered as a purely domestic affair. The fighters are not regarded as combatants and they are not entitled to the prisoner of wars status if they fall into the hands of the enemy.[105]

From the above discussion it is apparent that there is arguably little in the nature of the protections accompanying combatants and POW status that can be applied to participants in non-international armed conflicts.[106] There have been valiant efforts by International Tribunals to provide extended interpretation and application of the Article and Protocol II,[107] by National Governments granting amnesties to those involved in non-international armed conflicts and indeed in situations of violence which do not reach the threshold of armed conflict when the violence concerns issues of self-determination,[108] and by the ICRC[109] to extend the protective regime of international humanitarian law applicable to international armed conflicts to non-international armed conflicts. Despite these efforts, there have not been enough provisions and arrangements to form the basis of uniform combatant immunity for all persons who participate in non-international armed conflicts.[110]

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[105] Medard R. Rwelamira, "The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949" in Christopher Swinarski (ed) (n.100) 234 [emphasis in original].

[106] This view is opposite to that of Emily Crawford who is satisfied that the Protocol has covered the participants in the non-international armed conflict to a very large extent. See Emily Crawford (n.81) 76.

[107] *Prosecutor v Tadić* (n.8) para. 127; See also Sylvain Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations" (2009) 91 IRRC 69; Marco Sassòli and Yuval Shany, "Should the obligations of states and armed groups under international humanitarian law really be equal?" (2011) 93 IRRC 425; René Provost, "The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany" (2011) 93 IRRC 437; William Abresch, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" (2005) 13 EJIL 741; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Geneva: ICRC, 2005) 63; Hitoshi Nasu (n.83) 12.

[108] Jean-Marie Henckaerts and Louise Doswald-Beck (n.107) 611, Rule 159; Practice Relating to Amnesty cited in Mohamed Badar, Ahmed al-Dowoody and Noelle Higgins (n.55) 309.

[109] "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009" (2009) *IRRC* 90; see also Jelena Pejic, "Conflict Classification and the Law Applicable to Detention and the Use of Force" in Elizabeth Wilmhurst (ed) (n.81) 80-116; see also The ICRC is currently leading a consultation process on how to strengthen legal protection for persons deprived of their liberty in non-international armed conflicts. See: <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm> (visited 5 March 2017).

[110] Emily Crawford (n.81) 77; see also Dominic Hoerauf, "The Status of the Libyan Rebels under the Laws of War: A Litmus Test for the Lawfulness of NATO's Libyan Engagement under UN Resolution 1973" (2012) 6 Phoenix Law Review 93; see also *Prosecutor v Tadić* (n.8) para. 126; Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance" (2010) 42 Int'l L & P 641; W. Hays Parks, "Part IX of the ICRC 'Direct Participation in Hostilities Study: No Mandate, No Expertise and Legally Incorrect" (2010) 42 L & P 7, 68; Dapo Akande, "Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct

In the modern world where rebellion is so frequent that it is likely to affect international peace and security, the post-Charter framework has failed to deal with it effectively. Moreover, the gap has allowed state authorities to use force and prosecute the rebels in the way they want without providing for any accountability. By locating rebellion within the sole authority of the state the rebels have been put in jeopardy in terms of their rights and treatment in the hands of their opponents without any measures for oversight or accountability by the latter. In addition to being subject to excessive force by the government, rebels are susceptible to prosecution for their use of force against the government, unlike the government. This has put rebels in a disadvantageous position. In consequence, the current legal position favours the state authorities at the expense of the legitimate right of rebels to challenge tyrannical and despotic government.

This gap has been identified subsequently in the Turku Declaration on Minimum Humanitarian Standards, adopted in 1990. The experts' meeting recommended the adoption of another declaration of minimum humanitarian standards.[111] However, this Declaration is not binding and has not had a significant impact on the treatment of individuals in situations of violence. Since its adoption, follow-up work has been undertaken in the United Nations on this issue but no binding instrument on the issue has been drafted as yet.[112]

C. The categorisation of rebels as combatants, non-combatants, and unlawful combatants

A recent trend among state authorities is to identify a new category of the parties in hostilities i.e., unlawful combatant.[113] In addition to the two categories of participants in warfare recognised by international humanitarian law, namely combatants and non-combatants. This invention of state authorities or governments has placed rebels in further jeopardy. The key point of determination between combatant and non-combatant has been the "direct participation in the hostilities" which denotes that any civilian who does not participate

Participation in Hostilities" (2009) EJIL: Talk!, June 4 2009, available at: <http://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/> (accessed 22 July 2019).

[111] Declaration of Humanitarian Standards, reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its fourty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, UN Doc E/CN.4/1995/116 (Jan 31, 1995).

[112] Theodor Meron, "Towards a Humanitarian Declaration on Internal Strife" (1984) 78 AJIL 859; Theodor Meron, "On the Inadequate Reach of Humanitarian and Human Rights law and the Need for a New Instrument" (1983) 77 AJIL 589; see also Mohamed Badar, Ahmed al-Dowoody and Noelle Higgins, "The Origins", (n.55) 309.

[113] Emily Crawford (n.81) 69.

directly in the hostilities must not be targeted.[114] However, in recent non-international armed conflicts which are categorised as rebellions many civilians have been killed by state authorities on the pretext that they had lost their civilian (non-combatant) status when they took arms in the disguise of civilians.[115] That means, governments are treating such civilians not as combatants or non-combatants but as "unlawful-combatants" in order to justify civilian deaths. The problem with this argument is that there is no evidence to support their claim that non-combatants lost their status for being involved in using counter force.[116] Even if there is evidence in support, such claim is not legitimate as the government must not kill civilians who engage in violence, unless they are combatants.

From the analysis and evidence of the nature and extent of use of force by governments against rebels it is suggested that the categorisation of "unlawful combatant" has been unilaterally benefiting governments.[117] This is because it has been a difficult but not an impossible task for government forces to identify the rebels who carry out surprise attacks, disguised as civilians. In order to respond to this kind of threat from the rebels and to ease their task of identification of rebels, government forces have resorted to using indiscriminate force against civilians on the basis of their own assessment of such threat. For example, the United Nations Security Council Resolution 1199 in 1998 expressed grave concern at the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army which had resulted in numerous civilian casualties and the displacement of over 230,000 persons.[118] Another example is the indiscriminate targeting of innocent civilians by United States and Afghan air forces resulting in increased frequency and deaths.[119] Figures given to

[114] Nils Melzer, *International Committee of the Red Cross: Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Generva: ICRC, 2009) 41.
[115] Louise Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?" (2006) 88 Int'l Rev of Red Cross 881; for the killing of civilians allegedly by Syrian government force see also Bethan McKernan, "Pro-Government forces slaughter at least 82 while closing in on Syrian city Aleppo, UN says" (13 December 2016) <http://www.independent.co.uk/news/world/middle-east/aleppo-latest-battle-un-syrian-army-forces-government-regime-kill-civilians-massacre-assad-russia-a7471416.html> (visited 14 March 2017).
[116] Tamar Meisels, "Combatants – Lawful and Unlawful" (2007) 26 Law and Philosophy 31.
[117] Theodor Meron, "The Humanisation of Humanitarian Law" (2000) 94 AJIL 239; see also K. Dormann, "The Legal Situation of Unlawful/Unprivileged Combatants" (2003) 85 IRRC 849.
[118] S/RES/1199 (1998), 23 September 1998; see also Christine Gray, *International Law and the Use of Force* (n.66) 353.
[119] Nick Paton Walsh, Ehsan Popalzai, Masoud Popalzai and Angela Dewan, "Deaths of civilians spike as US, Afghan air forces pound Afghanistan" (10 October 2018) CNN.

CNN by the Afghan Ministry of Defense show that more than 800 airstrikes since the end of June 2018 to October 2018 were carried out by the Afghan air forces.[120]

V. The Status and Treatment of Rebels in Islamic Law in Contrast to Public International Law

As indicated in the Qur'anic text regulating armed rebellion and the precedents set by the fourth caliph, a series of peaceful conflict resolution mechanisms must be followed before the state uses force against the rebels. The head of the Islamic state is required to send an envoy to the rebels to listen to their justifications for the use of force and if their justifications are found to be valid, then the state must fulfil their demands.[121] If the envoy finds that their justifications are not valid, then he should explain to them the invalidity of their justifications and remove any misunderstanding that they have regarding the positions and/or decisions taken by the Islamic state.[122] If these discussions fail, then the rebels should be called – according to some jurists – to a *munāẓarah* (public debate) between them and the state authorities so that the public can judge the justness of their cause.[123]

If all these peaceful mechanisms fail, then the rebels should be advised/warned to renounce their plans for the use of force. If the rebels still insist and start using actual force against the state authorities, then specific rules of engagement apply in this category of internal armed conflict,[124] as will be shown in the next paragraph. No such mechanism exists under customary international law, under which states are under no obligation to engage in any level of discussion with rebels, and can treat them as mere criminals, depending on the intensity of their challenge. This is an important aspect of Islamic law, a type of "preventative

[120] Ibid.
[121] Intisar A. Rabb, "Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expressions" in Anver M. Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012) 153.
[122] Nahla Yassine-Hamdan and Fredric S. Pearson, *Arab Approaches to Conflict Resolution: Mediation, Negotiation and Settlement of Political Disputes* (Routledge, 2014) 133; see also Ahmed Al-Dawoody (n.9) 157.
[123] Ahmed Al-Dawoody (n.9) 162.
[124] Muhammad Bin Edress al-Shāfiʿī, *Kitab Al-Umm*, Vol. 4 (Beirut: Dar al-M'arifa) 218; ʿAlā al-Dīn al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'I*, vol 7 (2nd edn, Beirut: Dār al-Kitāb al-ʿArabī 1982) 140; Muḥyī al-Dīn ibn Sharaf al-Nawawī (n.31) 349; Muḥammad al-Khaṭīb al-Shirbīnī, *Al-Iqnā' fi Hall Alfaz Abi Shuja*, Vol. 2 (Beirut: Dar al-Fikr 1994) 549; Ahmad al-Qarāfī, *Al-Dhakhīrah*, Vol. 12 (Beirut: Dar al-Gharb al-Islami, 1994) 7; Ibn Taymiyyah (n.11) 65; see also Khaled Abou El Fadl (n.21) 15; Khaled Abou El Fadl (n.15) 152.

diplomacy" which, if implemented generally, could help to avoid violent clashes between rebel groups and government forces.

The Islamic law of rebellion guarantees a privileged status for the rebels during and, no less importantly, after the cessation of hostilities.[125] At the outset, it is interesting to note that the rules of engagement put both the conflicting parties, the state army and the rebels, on an equal footing and thus the same rules apply to both of them.[126] This means that both parties are to be held equally responsible for any violation of the rules of engagement of this specific category of internal armed conflict. As a rule, the jurists make it clear that on the part of the state forces, the aim of fighting is merely to force the rebels to stop their attack, *radʻihim* (to stop them) and not to kill them.[127] In other words, the state army must not deliberately attempt to kill any of the rebels. By the same token, this means that rebel attacks must be directed at, and limited to, achieving the objectives of their rebellion.

In addition to recognition of Prisoners of War (POWs) status and the prohibition of the use of indiscriminate use of force among the other protections guaranteed in international armed conflicts, there are a number of rules of engagement which are particularly relevant to fighting against rebels in Islamic law which include: (1) The rebels "could not be pursued if in rout"[128] or when they are escaping from the battlefield.[129] (2) The rebels' property could not be taken as spoils of the war.[130] (3) Their women and children cannot be enslaved.[131](4) Their wounded cannot be killed.[132] The instruction of the fourth Caliph reads:

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[125] M. Cherif Bassiouni (n.40) 249; see also John Kelsay, "Muslim Discourse on Rebellion" (2013) 27 Ethics and International Affairs 379; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan, 1998) 136.

[126] Majid Khadduri (n.19) 72; see also Ann Lambton (n.21) 211.

[127] John Kelsay (n.126) 379; see also Muḥammad ʻAbd Allah wild Muḥammadān, "Manhaj al-Sharīʻah al-Islāmiyyah fī Muwājahah al-Ḥurūb al-Ahliyyah: Dirāsah Taṭbiqiyyah ʻalā al-Ḥarb al-Ahliyyah fī al-Ṣūmāl", MA Thesis, Naif Arab University for Security Sciences (2006) 188.

[128] Sohail H. Hashmi, "Islam, Sunni", *Encyclopedia of Religion and War* (New York: Routledge, 2004) 219; see also Ahmed Al-Dawoody (n.9) 163.

[129] Zayn al-Din ʻUmar Ibn al-Wardi, *Ta'rikh Ibn al-Wardi* (Beirut: Dar al-Kutub al-ʻIlmiyya, 1996) I:150.

[130] Abu al-Hasan Ibn al-Athir, *al-Kamil fi al-Ta'rikh* (Beirut: Dar al-Kutub al-ʻIlmiyya 1987) III: 130; see also ʻIzz al-Din Ibn Abi al-Hadid, *Sharh Nahj al-Balagha* (Beirut: Dar al-Jil, 1987) IV: 25.

[131] Muhammad Abu Ibn Qutayba, *al-Imama wa al-Siyasa* (Cairo: Mustafa al-Babi al-Halabi, 1969) 77; Ahmad Ibn Hajar al-ʻAsqalani (n.23) XIV: 559; Abu Jaʿfar Muhammad Al-Tabari, *Ta'rikh al-Umam wa al-Muluk* (Beirut: Mu'assasat ʿIzz al-Din, 1987) IV: 581.

[132] Muhammad Bin Edress al-Shāfiʿī (n.125) 218; Muḥyī al-Dīn ibn Sharaf al-Nawawī (n.33) 343; Yūsuf ibn ʿAbd al-Barr, *Al-Kāfī fī Fiqh Ahl al-Madīnah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1986) 222; see also Nik Rahim Nik Wajis, "The Crime of *Ḥirāba* in Islamic Law" (PhD thesis, Glasgow Caledonian University 1996) 153; Khaled Abou El Fadl (n.15) 152, 160; Ahmed Al-Dawoody (n.9)163.

> When you defeat them [rebels], do not kill their wounded, do not behead the prisoners, do not pursue those who return and retreat, do not enslave their women, do not mutilate their dead, do not uncover what is to remain covered, do not approach their property except what you find in their camp of weapons, beasts, male or female slaves: all the rest is to be inherited by their heirs according to the Writ of God.[133]

Furthermore, weapons confiscated from the rebels in the battlefield cannot be used by the state army in the fighting against the rebels except in the case of military necessity[134] and after the cessation of hostilities all confiscated weapons must be returned to the rebels.[135] More importantly, the vast majority of the Muslim jurists agree that captured rebels must be set free[136], but they disagree on whether they are to be released during or after the cessation of hostilities, or after the rebels no longer constitute a danger to the state.[137] In addition to that, both the rebels and the government soldiers are equally not liable for the destruction of life and property during the hostilities[138] provided that, as referred to above, this was dictated by military necessity and was directed at, and limited to, achieving the objectives of using force in this category of internal conflict, as shown above.[139] This proves without a doubt that rebels fighting for a just cause are not criminals and that there is no punishment for them under Islamic law.[140] Moreover, the Islamic law of rebellion gives legal recognition to the rebels/secessionists for the sentences they pass and the executions they carry out during their control of a certain territory of the Islamic state provided that these sentences do not contradict Islamic law.[141]

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[133] Muhammad Hamidullah (n.19) 181.
[134] Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar* (Majid Khadduri tr, Beirut: Al-Dār al-Muttaḥidah, 1975) 229; Ahmad Ibn Idris al-Qarāfī (n.125) 11; Ibn Qudāmah, *Al-Mughnī: Fi Fiqh al-Imam Ahmad Ibn Hanbal al-Shaybani*, vol 9 (Beirut: Dar al-Fikr, 1984) 11.
[135] Majid Khadduri (n.19) 72; see also Ann Lambton (n.21) 211; for similar Shiʿa position see Al-Qadi Abu Hanifa al-Nuʿman, *Da'a'im al-Islam wa Dhikr al-Halal wa al-Haram wa al-Qadaya wa al-Ahkam* (Cairo: Dar al-Maʿrifa n.d.) I:251
[136] Ahmed Al-Dawoody (n.7) 176.
[137] ʿAbd al-Qādir ʿAwdah (n.12) 118; Nik Rahim Nik Wajis (n.133) 153; Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition" (2001) 91 The Muslim World 302.
[138] Khaled Abou El Fadl (n.15) 77.
[139] ʿAbd Allh b. ʿAbd al-Rahman Ibn Abi Zayd, *Al-Nawadir wa al-Ziyadat 'ala ma fi al-Mudawwana min Ghayriha min al-Ummahat* (Beirut: Dar al-Gharb al-Islam, 1999) XIV:543; see also ʿʿAbd al-Qādir ʿAwdah (n.12) 118; Nik Rahim Nik Wajis (n.133) 153; also Khaled Abou El Fadl (n.21) 21.
[140] Ahmed Al-Dawoody (n.9) 166; John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: WestminsterJohn Knox 1993) 93.
[141] Muḥammad ibn al-Ḥasan Al-Shaybani (n.135) 243; see also Muhammad Hamidullah (n.19) 79.

VI. The Potential of Islamic Law of Rebellion to Complement International Humanitarian Law (IHL)

The existing legal regime offered by International Humanitarian Law (IHL) is lacking in clarity and preciseness. This is evidenced, for example, by the uncertainty concerning the scope of Common Article 3, the threshold of Additional Protocol II and lack of opportunity for judicial creativity in applying rules relating to international armed conflicts to non-international armed conflicts. For instance, the Trial Chamber of the International Criminal Tribunal for Rwanda found it very difficult to apply IHL to internal armed conflict as it concluded that doing so would hinder the underlying protective purpose of both the Genevan Conventions and its Additional Protocols.[142] In addition, the practice of recognising situations of belligerency is almost obsolete, with parent states unwilling to confer legitimacy on rebels by recognising them, for fear that such legitimisation could endanger their state sovereignty. The same problem of state sovereignty persists in the realm of IHL.

The paucity of provisions in the Geneva Conventions dealing with non-state actors is testimony to the primacy of state sovereignty over humanitarianism.[143] The state sovereignty issue also impeded the extension of the IHL regime to non-state actors during the Diplomatic Conference 1974-1977.[144] While some states may argue that granting rebel status would fuel and legitimise terrorism campaigns[145] and others may point to the problems that non-state actors would face in trying to implement treaty burdens which were created for states,[146] the main argument behind the extension of the IHL regime concerning combatant and prisoners of war status both during the conference and since is that of "state sovereignty". However, an effective solution to this "state sovereignty" problem has been proffered by Islamic law which does not distinguish between international and non-international armed conflict, rather it makes universal application of the rights and status of rebels on equal footing with the rights and duties of the rulers.[147] Furthermore, in practice a trend has emerged among both state actors and non-state actors of applying IHL provisions unofficially during a conflict,

[142] *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 October 1998), para 628 – 633.
[143] Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins (n.55) 309.
[144] Ibid.
[145] Emily Crawford (n.79) 74. see also Douglas J. Feith, "Law in the Service of Terror" (1985) 1 National Interest 36.
[146] Emily Crawford (n.81) 74-76.
[147] Etim E. Okon, "Islam, War and International Humanitarian Law" (2014) 10 European Scientific Journal 100, 106.

thus avoiding armed conflict categorisation issues.[148] This does not affect state sovereignty as non-state actors are not given official recognition and so is an acceptable compromise.

While the question of the permissibility of rebellion under Islamic law seems to be unsettled, the issue of combatant and prisoner of war status under the Islamic system[149] seems to be much more protective of captured rebels than international customary law and IHL and could inform judicial interpretations of the status of those captured in a rebellion situation. Furthermore, the Islamic law of rebellion guarantees the right of political opposition to tyranny or the violations of the rule of law by state regimes and provides a series of mechanisms to resolve the conflict peacefully through discussion, negotiation and arbitration. No less importantly, the strict rules on the use of force peculiar to armed rebellion are equally applicable to both the rebels and the armed forces of the state and so considerably humanise this kind of internal armed conflict.

In fact, there is a lack of protection of peaceful opposition to the regimes in most of the Muslim countries let alone resort to armed rebellion. No Muslim country at present applies the Islamic law of rebellion no matter how much these regimes claim adherence to Islamic law.[150] For example, both Saudi Arabia and Sudan, which claim to apply Islamic law as a whole, have adopted the laws of banditry and apostasy into their legal systems but omitted, without comment, the law of rebellion.[151] Obviously for the regimes in the Muslim world the application of *aḥkām al-bughāh* would be impractical, excessively lenient and give the green light to every opposition group to take up arms against the state. But what is indeed regrettable here is that Muslim countries do not develop Islamic modalities of post-conflict justice;[152] they do not even adopt Islamic conflict resolution mechanisms in the case of armed

[148] Such agreements between non-state actors and states are generally known as "triangular agreements". See Michel Veuthey, "Guerrilla Warfare and Humanitarian Law" (1983) 23 Int'l Rev Red Cross 115; Michel Veuthey, "Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-international Armed Conflicts: The Role of the International Committee of the Red Cross" (1983) 33 Am U L Rev 83.
[149] Khaled Abou El Fadl (n.15) 243.
[150] Khaled Abou El Fadl (n.21) 27; Khaled Abou El Fadl (n.15) 337.
[151] Lawyers Committee for Human Rights, *Best by Contradiction: Islamisation, Legal Reform and Human Rights for Sudan* (New York: Lawyers Committee for Human Rights, 1996) 62; see also John Kelsay (n.126) 389;
[152] M. Cherif Bassiouni (n.40) 249.

rebellion as pointed out in the Qur'ānic text 49:9 and developed by the classical Muslim jurists over thirteen centuries ago.[153]

To conclude, the recent waves of violence in the Arab world committed either by the state against innocent civilians during peaceful demonstrations, or by insurgents against both the state authorities and/or innocent civilians, is in stark contradiction to Islamic law. The incursions of politics into the development and implementation of the Islamic law of rebellion is well demonstrated by the current practice of governments which often accuse rebels of treason, terrorism and crimes which are opposed to Islamic law of rebellion.

In its nature, rebellion is opposition to political abuse of power and this should have received more attention and treatment by international law but it has not been the case. The above examination of the legal framework of public international law suggests that it does not put the rebels and the governments on an equal footing but instead favours the already powerful governments against their opponents i.e., rebels. If the rights of rebels are not recognised and the powers of governments to use force against rebels are not effectively regulated then the latter is likely to resort to asymmetrical methods of warfare against their opponents, who are in a much stronger position in the current legal framework. Therefore, as long as the rebels and governments are not on an equal footing in terms of accountability and legal protection, the use of excessive and asymmetrical force is likely to be carried on by both parties to the conflict, with the rebels knowing that they will either be killed or prosecuted by their opponents who will not be held accountable in any way.

In contrast, Islamic law has made a platform where rulers and rebels are on an equal footing. While the Islamic law of rebellion does not endorse or legitimate rebellion without limit, it does not give rulers unfettered discretion in dealing with rebels. In other words, Islamic law allows rebellion if it is legitimate to use force against an unjust ruler and it has provided the criteria when a ruler can be classified as unjust. It also imposes limitations on the use of force by rulers against rebels. Therefore, it can be concluded that the status and protection offered by Islamic international law to rebels is more organised and advanced than that offered by International Humanitarian Law. Hence, Islamic law may be regarded as a

[153] Ahmed Al-Dawoody, "Conflict Resolution in Civil Wars Under Classical Islamic Law" (2015) 27 Peace Review 280.

positive contribution in the development of Public international law in providing an effective framework to deal with rebellion which is an oft-occurring situation in the modern world.

VII. Conclusion

The political unwillingness of state authorities to recognise the right of rebellion and use of force by rebels has resulted in the lack of an effective international legal framework to deal with rebellion. The UN Charter deals with internal armed conflict as an "international peace and security" issue but fails to deal with it by providing an effective legal framework.[154] The existing legal framework of public international law, namely the Geneva Conventions and its Additional Protocols, does not effectively meet the challenge posed by the nature of the conflict between rebels and rulers.[155] This framework provides illegitimate advantages to state authorities over rebels in the recognition of right to rebel and in the treatment of rebels. This has resulted in an imbalanced platform of law and politics. This imbalanced platform has raised the question of legitimacy of public international law which has not only widened the gap between the legal protection of rulers and rebels but also failed to effectively regulate rebellion. In addition, this legitimacy question has also been raised in regard to the use of force by the authorities of Muslim states who constantly ignore the rights and the status of rebels as recognised in Islamic law. In these circumstances, it is necessary for public international law to fill this gap by adopting the juristic tradition of Islamic law of rebellion which is a distinct legal system that enjoys a long tradition of juristic engagement with use of force by and against rebels.

[154] Nico Schrijver, "The Ban on the Use of Force in the UN Charter" in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press (1st ed.) 2015) 486.
[155] See section under the title "The Status and Treatment of Rebels in Islamic Law in contrast to Public International Law" above.