

PRINCIPLES REGULATING THE CONDUCT OF HOSTILITIES UNDER ISLAMIC LAW COMPARED TO THE INTERNATIONAL HUMANITARIAN LAWS OF THE GENEVA CONVENTIONS

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ABSTRACT: *Modern armed conflicts are employed in a wide array of operations that range from peacetime to outright international armed conflict, and thence the necessity to regulate armed conflicts especially in the conduct of hostilities. Islamic Law has a complete system of law has corresponding rules regulating the conduct of hostilities and imbibe therein is the elementary considerations of humanity. This paper examines the principles regulating the conduct of hostilities under Islamic Law compared to the International humanitarian laws of the Geneva Conventions and concludes that the fundamental rules and principles of international humanitarian law relating to restriction on the means and methods of warfare, principle of proportionality, use of force, inviolability of civilian and non – combatant population and property as well as protection of the wounded, sick, ameliorate and captured combatants and or prisoners of war show striking similarities with that of the Geneva Conventions.*

KEYWORDS: **Hostilities, Islamic Law, International Humanitarian Laws, Geneva Conventions**

INTRODUCTION

Armed conflicts have unfortunately become an inherent characteristic. It is indeed one of the most ancient form of inter course between various communities in the world. Conflict situation in general are as old as the beginning of life here on earth. That is from the point where man moved from the state of purity to the state of impurity. Armed conflict is first and foremost the unfortunate or dismissal result of failed endeavor of mankind to settle real problems and solve immediate conflict by peaceful means.¹ In all situations of armed conflicts or hostilities, there must be human suffering.

It is not therefore an exaggeration to say that armed conflicts have caused a great and memorable sordid hole to mankind. It has left also an indelible spectacle in the minds of mankind that will forever remain fresh throughout the history and existence of man on the face of planet earth. Limits on the way wars are waged have existed for centuries. It was often a matter of unwritten

¹ For example, international organization has become a great promoter of sheer diplomatic loquacity and has provided an exceptional opportunity for the exercise of propandistic skill, disarmament debates equally provides a good example as one might see of speeches for the records only and proposals formulated with a view to their unacceptability. See equally Claude Jr, (1964) "Sword into Plowshares" New York, Random House, Pp 295-296.

understandings on how to behave, sometimes a reciprocal recognition of the reality of potential retaliation if certain limits were overstepped. On occasions, common humanity limits the impact of war².

Efforts by the international community to introduce effective legal limits on the conduct of war began seriously in the 19th century. Through a series of treaties such as the Geneva Conventions and their Additional Protocols, and the growth of customary law, there is now an extensive body of law regulating the conduct of hostilities. The general principles are enshrined in The Hague Convention of 1907 and the 1949 Geneva Conventions and their Additional Protocols of 1977. But there are a series of other treaties covering specific issues particularly in the field of weapons. In 2005 the ICRC published a major study on the extensive body of customary international humanitarian law, which is binding on all states.³

The central principle of distinction runs through all the law relating to the conduct of hostilities. Indiscriminate military action is prohibited.⁴ All sides in the conflict must distinguish between legitimate military targets on the one hand and civilians objects on the other⁵. Deliberately targeting civilians is a war crime. All sides must take measures to separate as far as possible military targets from population centers.⁶ While it is accepted that civilian casualties may be sustained in situations where military target are attacked, both sides are required to take whatever measures possible to minimize injury and death among civilians, and damage to civilian objects.⁷ If an attack is expected to cause “collateral civilian damages” that are excessive in relation to the concrete and direct military advantage anticipated, it must be cancelled or suspended.

IHL forbids the terrorizing of civilian population and the destruction of their means of survival by attacks on crops, water supplies, medical facilities, housing and non – military transport.⁸ Hostage taking and the use of human shields are likewise prohibited. The methods and means used in military action must be proportionate to the military objective⁹. Tactics or the excessive use of power or force that cause unnecessary death or destruction among civilians is prohibited.¹⁰ So too are methods and means that cause unnecessary suffering to enemy combatants. The wounded and sick and those no longer taking part in hostilities must be respected¹¹. Medical facilities and personnel must not be attacked.¹² All parties to a conflict must respect the use of the protective

² ICRC, “International Law on the conduct of hostilities: overview” available of <http://www.Icrc.org/eng/war-and-land/conduct-hostilities/overview.co> retrieved on 13/6/2012.P1.

³ Henckarts J. M, (et al) (2005), Customary International Humanitarian Law, Vol. 1 (Rules), Vol. II (Practice) Cambridge University Press, Rules 1 & 7.

⁴ *Ibid.* Rules 11 – 13.

⁵ *Ibid.* Rule 1 & 7.

⁶ *Ibid.* Rules 15 – 24.

⁷ *Ibid.* Rule 54.

⁸ *Ibid.* Rules 36 – 37.

⁹ *Ibid.* Rule 14.

¹⁰ *Ibid.* Rule 57 – 65.

¹¹ See Article 51 paragraph 5(6) Additional Protocol 1 1977.

¹² *Ibid.* Rules 25 and 27 – 30, and Rule 26.

emblems enshrined in the Geneva Conventions and their Additional Protocols, namely the Red Cross, the Red Crescent and the Red Crystal.¹³

Limits on the conduct of hostilities under IHL also cover cultural property and the environment. Targeting cultural property or using it for military purposes is prohibited. Military action must not unnecessarily destroy the natural environment or create environmental problems for the future. Special references are also made to naval and air warfare and the role of civil defence during armed conflicts.

Regulations pertaining to the choice of weapons clearly constitute a major part of the law on the conduct of hostilities. Under IHL, this choice is not unlimited. In addition to the principles of distinction and proportionality, IHL has outlawed specific types of weapons through a series of international treaties, in particular biological and chemical weapons, blinding laser weapons and anti – personnel landmines. Most recently, in 2008 the Convention on Cluster Munitions was adopted.

The Common Article 3 of the Four Geneva Conventions¹⁴ presents a list of rules which as stated by the International Court of Justice in its judgment in the dispute between Nicaragua Vs United State,¹⁵ are expression of fundamental consideration of humanity and therefore binding on all states.¹⁶

Common Article 3 rules are part of customary international law.¹⁷ There have been many debates on its applicability. For some commentators, the provision only affords protection to persons falling under the direct control of a party to the conflict and therefore the article has no direct relevance for the conduct of hostilities.¹⁸ For others, the reference to violence to life and persons

¹³ *Ibid*, Rule 57 – 65.

¹⁴ Of 12th August 1949.

¹⁵ International Court of Justice, case concerning Military and Paramilitary activities in and against Nicaragua, judgment of 27th June 1986 (merits), paragraph 218.

¹⁶ It is binding not only because it is part of international treaty law but also an expression of (unwritten) general principles of law. It is absolutely binding international law. *Jus Cogens*.

¹⁷ See International Court of Justice (ICJ), Military and Paramilitary Activities in and against Nicaragua, (Nicaragua Vs United States of America) judgment of 27th June 1986, ICJ Report, Para 218. Similar remarks were made by the court in the 1996 Nuclear Weapons Advisory Opinion of 8th July 1996, ICJ Reports 1996 Para 79. Statements on the Customary nature Common Article 3 have also been made by the adhoc International Criminal Court for the former Yugoslavia, (ICTY), Prosecution V. Tadic, Case No, IT-94-17, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, Para 98. International Criminal Tribunal for Rwanda (ICTR), Prosecutor V. Akayesu case No. ICTR 96-4-T, judgment, 2nd September 1998, Para 608.

¹⁸ See e.g., Liesbeth Zegveld (2002), The Accountability of Armed Opposition Groups in International Law, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, P. 83, G. I. A. D Draper, “Wars of national liberation and war criminality”, in Micheal Howard (1979), Restraints on war: Studies on the limitation of armed conflict, Oxford University Press, Oxford, P. 183; Georges Abi-Saab (1988), “Non-International armed conflict” In International Dimension of Humanitarian Law, UNESCO and Martinus Nijhoff, Dordrecht, P. 235. The Rome Statute of the International Criminal Court also appear to distinguish between acts prohibited under common Article 3 and other violation committed during the conduct of hostilities. See Rome Statute Art. 8(2) (c) and 8(2)(e).

would cover acts committed in the cause of military operations. Thus for example, Rogers affirm that:

*“Common Article 3 does not deal directly with the conduct of hostilities it seems at first sight; only to protect the victims of such conflicts... However, a close reading of the text of the article leads to the conclusion that it does more than that, for example, the principle of civilian immunity can be inferred from paragraph 1, which prohibits violence to the life of persons taking no active part in hostilities”.*¹⁹

However Additional Protocol II applies:

*“To all armed conflicts... which take place in the territory of a High Contracting party between its armed force and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operation as to implement the Protocol.”*²⁰

Additional Protocol II introduces a higher threshold of application than the common Article 3.²¹ War is a part of life. If a war is just, not for the purpose of brute conquest and imperial expression, nor for aggression and hatred, then such a war has a positive role to play in preserving civilization and removing from it the blights that seek to bring it down. Just and legitimate warfare is a necessity in order to resist aggression and oppression, to defend against enemies, and to overcome those who oppress the truth and forcibly keep people from it.

As Islam stands against waging war, especially against the innocents, it never overlooks the possibility that mankind may resort to war against each other. That is why it shows keenness on regulating warfare between parties and not only that, but also setting rules regarding those taken as prisoners of wars. Islam does not allow any form of abuse whether it is physical or sexual. On the contrary, the Islamic texts have preceded the Geneva Conventions in all ramifications relating to how hostilities are to be concluded.

In this paper, a discussion would be made of the rules of Islamic law relating to issues bordering on the Geneva principles of the conduct of hostilities taken the rules of International humanitarian law which according to the International Court of Justice are “elementary consideration of humanity.”²² Summarized into, restriction on the means and methods of warfare, principle of

¹⁹Rogers, A. P. V (2004), Law as the Battlefield, 2nd Edition, Manchester University Press, Manchester, P. 221. See also Lindsay Moir (2002), The law of international Armed Conflicts Cambridge University Press, Cambridge, Pp. 58 – 61.

²⁰ See Article 1(1) Additional Protocol II. As Moir has noted, the condition set out by Article 1 of the Protocol imply that it gives only “The most intense and large scale conflict. See Moir L (2002), The law of International Armed Conflict, Cambridge University Press, Cambridge, P. 101.

²¹ In contrast to Additional Protocol II, Common Article 3 also regulates armed conflict that takes place only between armed non-state actors for example in a failed state.

²² See the Corfu Channel case (1949) ICJ Rep. 4.

proportionate use of force, inviolability of civilian and non combatant population and property, and protection of the wounded, sick, ameliorated and captured combatants²³ (POWS).

It is apt however for a better understanding to discuss the primary sources of Islamic Law and the basis Islamic Law principles.

PRIMARY SOURCE OF ISLAMIC LAW

The Glorious Quran

The Quran is the basis of all Islamic Law. In its literal sense, it means the words of Allah (SWT) revealed to the Holy Prophet Mohammed (SAW) over a period of 22 years (i.e. 610 AD 632 AD) through Angel Jibril²⁴ the Quran is immutable since its revelation, the text has not changed even in the minutest of details²⁵ The Quran contains two kinds of rules; general and specific. The general rules are far more numerous. The specific rules tend to deal with matters of worship or with matters relating to family, Commercial or Criminal Law.²⁶ Other matters involving those in the area of Constitution law and War are governed by the general rules.²⁷ The predominant reliance on general rules by the Quran was viewed by the Mujttahids²⁸ as the indication of divine mercy and wishes to facilitate for Muslim, the practice of their religion throughout the ages. The activity which the Mujttahids engage is called “Ijtihad.

Sunnah.

This is another major and significant source of Islamic Law. The Sunnah comprised of the reported sayings of the Holy Prophet (SAW), his reported actions, which includes his silence or acquiescence in instances where such behavior is viewed as permissive. The Sunnah is equally used to supplement Quranic laws as well as help in its interpretation²⁹. The Holy Prophet (SAW) prohibited the recordings of the Sunnah for the purposes of undermining the status of the Quran as the only source of divine law. This made a substantial part of the Sunnah unrecorded until the 9th and 10th century during the Abbasid rule.³⁰ There is however evidence of recording the Hadith based on the argument that earlier prohibition was temporal and only related to the earlier period of Quranic revelations. It was for this reasons that Muslims scholars developed a sophisticated science of attribution in connection with the Sunnah for the purposes of minimizing the problem associated with hearsay.³¹

²³ See for details: Best G (1983), Humanity in Warfare, Melthve & Co Ltd, London; Claude R. (etal) (1982), Human Rights in the World Community, University of Pennsylvania Press.

²⁴ See Rahman R (1979), Islam 2nd Edition, PP 30 42.

²⁵ See Mahmassani .S (1961), Falsafat Al tashri fil Islam 3rd Eds, Beirut, P. 146.

²⁶ For a detailed discussion on this point, see Abdul Hamid .M (1974), Mabadi Nizam Al Hukum Fil Islam 2nd Edt, Alexandria, Pp 3 – 36.

²⁷ *Ibid* at P 34.

²⁸ Mujttahids literally means “Those who study hard” and “those who engage themselves intellectually”. It also means, “those who are engage in the process of interpreting Islamic text and Islamic Law”.

²⁹ Mahamassani .S. Falsafat AlTashiri Fil Islam op cit at P. 151.

³⁰ Esposito J. L (1991), Islam: the Straight path, P 87.

³¹ See Mahmassani .S, Falsafat AL-Tashri Fil Islam op cit P 81.

The above resulted in the classification of the transmitted sayings or behaviors of the Holy Prophet (SAW) into the following; false, weak, truthful or completely trustworthy.³² These were collected into different book of Hadith to justify these categorizations. It must be pointed out that the secondary sources of Islamic jurisprudence are concession (*Ijma*) and reasoning by analogy (*Qiyas*). However, there are divergent opinions as to that extent to which these are fully validated as secondary sources of Islamic Law.³³ This does not however in any way actually undermine the broad concession of the majority of jurists and scholars who hold the view that both *Ijma* and *Qiyas* are sources of Islamic Law.

BASIC ISLAMIC LAW PRINCIPLES

i. Change in time, place and circumstances

A major principle of Islamic jurisprudence is change in time, place and circumstances. This principle permits a Mujtahid to examine a specific text of the Quran in the light of both the attendant circumstances of its revelation as well as its meanings to determine the scope and significance of the text in general or with respect to a specific situation at hand. Thence, if the circumstances surrounding the revelation of a verse are significantly different from those under consideration, then the possibility exist that the verse may not be applicable to the situation at hand.

ii. Necessity or Avoidance of Harm.

This is a principle of Islamic Law and it is stated to mean choosing the lesser evil. The Quran permits the possibilities in case of necessity or severe harm.³⁴ The Quran also provide for Allah's forgiveness on anyone who breaks his commandment under duress.³⁵ This is why it is argued that Islam is a religion of facilitation rather than complications.³⁶

iii. Public interest

This simply denotes that Islamic Laws must accord with the dictates of public interest. Further details of these principles are discussed in the body of this paper.

Meaning and scope of Jihad under Islamic law.

The word "*Jihad*" is derived from the basic root "g _ h _ d", which means struggle or endeavor.³⁷ Therefore *Jihad* means to strive hard; to forbear hardships for a great cause. In the lexicon of Islam, the term *jihad* has two meanings, one narrower and the other much wider. In its widest sense, it covers every activity and struggle for making the word of God Supreme. It even includes one's effort for purification of his soul, *Mujahadah*. In a sense, it also includes striving hard to find out and ascertain the intent of the law giver.

³² *Ibid* at PP 60 – 64.

³³ Mutawalli for example question the usefulness of these two additional sources in today's Islamic community and discussed reasons for rejecting the remaining sources. See Mutawalli .M. *Abadi Nizain Al Hukum fil Islam* op cit at PP 78 – 79.

³⁴ Quran VI: 199 & Q VI: 145.

³⁵ Quran XVI : 115.

³⁶ Badr Al din Al Aini, *Umdat Al Qafi fi Sharh Sahih Al Bukhari* (1434) reprint, (1979), Cairo at PP. 66 – 67.

³⁷ Ibn Manzuri *Lisan Al Arab* . (2003), Cairo. Dar al Hadith Vol. 2 P 240 – 241; Hans Wehr, *A Dictionary of Modern Writer Arabic*, (1974) London; Macdonald and Evans Ltd P. 233.

In its narrow sense, Jihad is use in the meaning of war i.e. war for the purpose of making the war of God supreme.

The terms Ghazwah denotes the war in which the Prophet personally took part and Sirah literally means conduct, but technically denotes biography of the Prophet or his conduct. The books that dealt with the Islamic *Jus ad bellum* and *Jus in bello* were given the names Siyar because these rules were based on the Prophets conduct during the wars against his opponents and the earlier treaties on war were called Maghazi.

Majority of the Muslim jurists are of the opinion that the cause of Jihad or war contrary to what is largely believed is not Kufr (disbelief) but Muharabah (aggression).³⁸ Thence, mere disbelief in Islam does not of itself legalize killing. Rather it is Muharabah (aggression) that makes it permissible to kill the muharib (aggressor). This is why; it is not allowed to kill women, children, and people of old age, handicapped and other who do not have capacity to fight. This is indeed similar to the position under the Geneva Conventions in our contemporary era.

If therefore *Kufr* (disbelief) is the cause (*Qital*) of jihad, it is argued that Islamic Law would not have given protection to non Muslims citizen of Islamic state and it would have amounted to compulsion in matters of religion and thus violating the Quranic injunction: “There is no compulsion in matters of religion.”³⁹ So Muslims are only entitled to fight only those who commit aggression against them. Sarakhsi⁴⁰, one of the great Jurists of all times states: “***The purpose of the obligation of jihad is to protect Muslim from their opponent so that they may be able to live good worldly life in accordance with their religion.***”⁴¹

General Principles for the Conduct of Jihad

One of the distinguishing features of the conduct of hostilities in Islam as oppose to what is obtainable in the international humanitarian laws as embedded in the Geneva Conventions is that Islamic law acknowledges and recognizes to the fullest the principle of reciprocity. Thus for example, fighting in inviolable place i.e. Maasjid al – Haran (Mosque) was initially prohibited But the Quran allows it in reciprocity and within the limits of necessity.⁴² Similarly, fighting in the sacred months (Al–Ashhur. Al – Hurum) was initially prohibited but Muslims were allowed to take up arms in self defence only if the opponents attack them in violation of the sanctity of the sacred Months.⁴³

³⁸Ibin at – Humam, Fath al – Qadir Vol. 4 P.291; Sahnun Abdal – Salam. B. Sai’d al Taankhi, *Al – Mudawwanah al Kubra* (Damaan: Dar al fikr (1966) Vol. 3 P. 6: Some of the Shafi’i and Hanbali considered Kufr (disbelief in Islam) to be the cause of Jihad.

³⁹ Qur’an 2:256. See for secularly analysis of the issue; Muhammad Munir, “Public International law and Islamic international law: Identical expression of world order” Faculty of Shariah and Law, International Islamic University Islamabad, 372.

⁴⁰ AbuBakar Muhammed. B. Abi Sahl al – Sarakhsi was one of the must renowned Hanafi Jurists.

⁴¹ Sarakhsi A.B. *Al – Mabsut* (Beirut: Daral. Ma’rifah (1978) Vol. 10 P. 28.

⁴² See Quran 2:191.

⁴³ Quran 2:194. There are other verses as well that acknowledge this principle. See Quran 2:190 – 191 and 9:36.

But reciprocity alone cannot justify deviation from the norms of Islamic Law.⁴⁴ Hence the doctrine of necessity goes hand in hand with that of reciprocity. Necessity also should be kept within its limits. Therefore, what becomes permissible due to necessity remains so only up to the limit of necessity.

Some other related principles are;

1. A wrong is not avoided by another of the same kind.
2. What becomes lawful for a reason becomes unlawful when such reasons disappear. This along with the principles of necessity gives rise to the principle of proportionality.

The Muslim jurist allows parties to a conflict to agree on certain rules for the conduct of warfare. Shaybani, the father of Muslim International Law asserts that it was common practice in those days to agree what not to do in the conduct of war. The Geneva Conventions and Additional Protocols thereto are modern day example of such treaties. Acts therefore prohibited under these treaties are forbidden only so long as the treaties are in force, except where the Shariah also prohibits them. This forms the basis for making the provisions of the international humanitarian law binding on Muslims. These general principles run throughout Islamic Law of conduct of war (*adab –al – qital*).

***Restraints in the Conduct of Hostilities under Islamic Law
Inviolability of the Civilian Population and Property.***

Parties to a conflict must at all times distinguish between civilian and combatants and must not be directed against civilians. Acts or threats of violence where primary purpose is to spread terror among the civilian population are prohibited. Civilians here refer to persons who are not members of the armed forces and civilian population comprises of all persons who are civilians and are protected against attack, unless and for such times as they take part in hostilities.

Parties to a conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives and must not be directed against civilian objects. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use made an effective contribution of military action and whose partial and total destruction, capture, or neutralization, in the circumstances, ruling at the time, offer a definite military advantage.

Civilian object encompass all objects that are not military objectives. They are protected against attack, unless and for such time as they are military objectives. These indiscriminate attacks⁴⁵ are prohibited. The principle of proportionality must be observed in the conduct of hostilities in armed

⁴⁴ Professor Imran Ahsan Khan Nyzaee, an authority on the classical Hanafi texts, states: “Although reciprocity is or acknowledge principle of Islamic Law, no rule of reciprocity can set aside, suspend, or permanently remove a fundamental rule of the Shariah”. See “Islamic Law and Human Rights”, Islamabad Law Review, Faculty of Shariah and Law international Islamic University Islamabad, Spring, Summer, 2003 Vol. 1; 1 & 2 P. 30.

⁴⁵ Indiscriminate attack are those (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method on means of combat the effects of which cannot be limited as required by intentional humanitarian law; and consequently, in each such case, are of a nature to strike military objective and civilian objects without distinction.

conflicts⁴⁶ and that the parties must also adhere to international humanitarian law rules governing precautions in attack or against the effect of attacks.⁴⁷ Prohibited weapons are not to be used. The general IHL rule that civilians are entitled to protection against the danger arising from military operations⁴⁸ is thus modified if they directly participate in hostilities. IHL expressly provides that civilians are protected from direct attack – meaning that they may not be targeted unless and for such time as they take a direct part in hostilities.⁴⁹

As opposed to combatants who may not be prosecuted by the capturing state for direct participation in hostilities (combatants privilege), civilians who take a direct part in hostilities may be prosecuted for having taken up arms and full acts of violence committed during both participation by the detaining state as well as, of course, for any war crimes or other crimes under international law committed. This rule is the same in both international Armed Conflict IAC's and Non-International Armed Conflict NIAC's. Civilian direct participation may be prosecuted under domestic law when it does not constitute a violation of IHL and is not a war crime *per se* under a treaty or customary IHL.⁵⁰

Conduct that amount to direct participation in hostilities

The notion of direct participation of hostilities refers to specific hostile acts carried out by individuals as part of the hostilities between parties to an armed conflict. This applies to both IAC's and NIAC's situations.

In order to qualify as direct participation in hostilities, a specific activity must fulfill the following cumulative criteria:

- 1. The act must be likely to affect adversely the military operation or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on person or objects protected against direct attack (threshold of harm); and***
- 2. There must be a direct causal link between act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and***
- 3. The act must be specifically defined directly to cause the required threshold of harm in support.***

Protection of the Victims

Members of the armed forces and other persons who are wounded or sick, are to be respected and protected in all circumstances. They are to be treated humanely and cared for by the party to the conflict in whose power they may be without any distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempt upon their lives or violence to their person, shall be strictly prohibited. In particular, they are not to be murdered or

⁴⁶ Launching of an attack which may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects or a combination thereof would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

⁴⁷ Customary law study, Rules 15 – 24.

⁴⁸ Art 51(1) AP I.

⁴⁹ Art 51(3) AP I, Art 13(3) AP II.

⁵⁰ See, for example, the list of war crimes under Article 8 of the ICC Statutes.

exterminated nor subjected to torture or to biological experiments or willfully left without any medical assistance and cure or be exposed to conditions contagious or infectious to them.⁵¹

To close any loopholes, Additional Protocol 1 contains an extensive provision on the treatment of persons in the power of a party to the conflict.⁵²

Article 75 of the Additional Protocol 1 therefore constitutes a “safety net for human right” that is of inestimable value for their reason. It is of special interest, forming as it does the link between protection of human beings through international humanitarian law and the guarantees contained in human rights treaties. Since 1977 the “hardcore of human rights” has been more or less uniformly defined in the laws applying to war and peace. Under Islamic law, the starting point of Islamic injunction relating to non-combatant’s immunity is the verse of the Quran⁵³ which states: ***”Fight in the way of Allah against those who fight you, but do not commit transgression lo! Allah loveth not transgressors.***

Some Muslim jurist argues that the command “do not commit transgression” implies that Muslims should not initiate hostilities.⁵⁴ Some other jurist argues that this command also includes prohibition of mutilation of the dead bodies of the enemy soldiers and maltreatment of the prisoners of war.⁵⁵ Some others Muslim Jurist⁵⁶ believed that the command also implies that Muslims should refrain from killing those who are not capable of fighting such as women, children old people, monks and other non-combatants. They relied on two grounds for their argument. Firstly, the word that occurs on the verse “Fight” which implies conflict between two or more people who activity engage in strife and not between one who is a combatant and one who is not a non-combatant.

Bukhari reports on the authority of Ibn Umar that at the time of the conquest of Mecca, when the Holy Prophet (SAW) found the dead body of woman in the battle field, he exclaimed, “Why was she killed? She was not fighting!” then he prohibited the killing of women and children.⁵⁷ Several other companions reported that the Prophet would not kill woman and children in wars and he prohibits his companion from killing women and children.⁵⁸

⁵¹ See paragraph 1 to 4 of Art 12 of the 1st Geneva Convention Article 72 of the 2nd Geneva Convention relating to prisoners of war and Article 22 of the fourth Geneva Convention relating to civilian are similarly worded.

⁵² See Article 75 of Section III entitled “Fundamental guarantees” reads like a condensed version of the Declaration of Human Rights, specifically framed for conditions of war. It represents a minimum provision which is subordinate to the more extensive guarantee contained in the individual Geneva Convention or in human rights treaties.

⁵³ Q. 2:190.

⁵⁴ *Ibid.*

⁵⁵ The Interpretation is upheld by Sa’ib .b. Jibayr, Abdul Aliyah and Abu – al – Hassan al – Bairi in their works Non Combatant Immunity P.2.

⁵⁵ *Ibid.*

⁵⁶ These Include Abdullah b. Abbas, the Prophet cousin whom the Prophet gave the title, “The interpreter of the Quran”, his disciple Mujahid and Umar b., Abd – al – Aziz “the fifth rightly – guided caliph”.

⁵⁷ See Bukhari, Kitab al Jihad, Hadith No. 2791.

⁵⁸ Muslim reports this prohibition from Ibn Abbas, Abu Dawud and Ibn Majah. See equally Bukhari Kitab al Jihad, Hadith No. 3377, 2295 and 2832.

The famous tradition about the Holy Prophets (SAW) commandment to his commanders which form the basis of Islamic *Jus in bello* amongst others states:

“...Do not break your pledge, do not mutilate (dead bodies) and do not kill the children...”⁵⁹

The Commandment of the successor of the Holy Prophet (SAW) such as Abu Bakr, was reported to have instructed the commander of his troops in the following manner:

“I enjoin upon you ten injunctions. Remember these: Do not embezzle. Do not Cheat, Do not break trust. Do not mutilate, Do not kill a child or an old man or a woman, Do not hew down a date, palm or burn it, Do not cut down a fruit tree, Do not slaughter a goat or cow or camel except for food... Maybe, you will pass near a people who have secluded themselves in convents; leave them and their seclusion”⁶⁰

Umar, Uthman and Ali Khalid. b. al Walid, the famous general of Islam were also reported to have given the same instruction to their subordinates.⁶¹ The reason for the exclusion of women, children, peasants and tradesmen was their non combatant status. By way of *Qiyas* (analogy) in Islamic Jurisprudence, the rule can be extended to all classes of non combatants. Thus Islamic law did not confine itself to enumerating the kinds of non – combatants who are immune but by analogy this will apply to everyone who does not take part in war.⁶² The majority of the jurists believes in the immunity of all those who do not take part in combat.⁶³ But they proved this immunity in different ways on the basis of their theories of interpretation.

The general command in the Quran which reads:

“Then, when the sacred months have passed, slay the idolaters wherever ye find them, and take them (captive), and besiege them, and prepare for them each ambush.”⁶⁴

has been qualified by the next verse which reads:

“And if anyone of the idolaters seekth thy protection, then protect him so that he may hear the word of Allah; and afterwards convey him to his place of safety. This is because they are a folk who know not.”⁶⁵

The above verse therefore gives immunity to a class of non – Muslim; those seek protection from the Muslims.

⁵⁹ This tradition have been reported by several traditionalists from a number of companion that include “Abdullah .b. Mashud, Anas. B Malik, Samurah, Ya’la, Buraydah, Shaddad, Imran and Abu Ayyub. See Ghazi, Mahmood Ahmed (1998), Chapter on “Muslim International Law” with original text of Al – Siyar – Al – saghir (Islamabad Islamic Research Institution , P1 of the Arabic text and P.43 of the English Translation.

⁶⁰ See Al – Tabiri, Ta’rikh al – Umam wa – al – muluk, Beirut: Dar Ihya’al – Turath al – Arabi, (1994) Vol. 3 Pp. 849 - 50.

⁶¹ For details see Al – Juwayni, Abdal – Malik .b. Abdullah (2002), Usul Fiqh , Beirut; Dar’ Ihya al – Turath al – Arabi, Vol. Pp 28 – 76.

⁶² Al- Zuhayli Wahbah, Athar al – Harb P. 74.

⁶³ Ibn Hazim, Ali .b. Ahmad (1934), Al Muhalla bi al – Athar, (Cairo: Idarat al – Taba’ah al Muninyah), Vol. 7 P. 296 – 297.

⁶⁴ Q 9:5.

⁶⁵ Q 9:6.

It must be stressed that even when Muslims were allowed to initiate a military campaign, it was in fact, a hostilities of the previous hostilities, which were imposed upon Muslims by their opponents.

The conclusion of the Muslim jurist is that all classes of non combatants enjoy immunity from the effects of war.

Loss of Immunity of Non – Combatants

When individual take part or assist in actual combat, they lose their status of being non – combatants and become one of the aggressors. Hence it becomes legitimate to kill them during combat

In an age when there were no organized enemies, every adult male member of the community would take part in combat and hence would be considered a potential, if not actual, combatant.

On the other hand, women, children and the old though potentially non – combatants would be considered combatants only when they take part in actual combat. In modern time, however, every state has an organized and well trained army. Hence the presumption under Islamic Law about all civilian male and female is that they do not take part in combat.⁶⁶

The 2nd instance in which civilian and non – combatants lose immunity is that of duress. Thus, the Prophet allowed night raids (necessity) on enemy even if there was a possibility that women and children could become targeted because they were in close vicinity to the combatants.⁶⁷ But again, “necessity” should be kept within its limits.

Muslim jurist have generally agreed on the issue that if the enemy uses non – combatant as a human shield to protect themselves and attack Muslims, then the non – combatants can be killed in the combatants, even though these are these Muslim women, children and prisoners of war. Then killing is allowed under the principle of necessity.⁶⁸ Muslim jurists further unanimously agree that there will be no compensation in material terms for the killing of non – combatant in such a situation.⁶⁹

Restrictions on the Use of Weapons

In today’s contemporary armed conflicts, the use of nuclear weapons particularly, violate certain basic norms of Islamic and international humanitarian laws. These include:

- a. Inviolability of civilian and other non – combatant;***
- b. Prohibition of indiscriminate attacks;***
- c. Prohibition of unnecessary injury to combatants;***
- d. The principle of proportionately’***
- e. Inviolability of the territory of neutral states;***

⁶⁶ See Munir, Non Combatant Immunity op cit, P. 48.

⁶⁷ Muslim Kitab Al – Jihad Hadith No. 432.

⁶⁸ Mushtaq, Use of force for the Right of Self Determination. 179. Dr. Hamidullah says “it appears that in classical times of Islam, it was a present practice among non – Muslim to take shelter behind enemy prisoners. I have not found a single instance where they force their prisoners to fight against their notion.

⁶⁹ See Al – Zuhayli Wahbahi Alfiqh al – Islam Wu Addilatuhu. (Damascus: Dar al Fikr) 1984. Vol 6 P. 424. See also Art. 51 (7) of Additional Protocols 1 to the Geneva Convention relating to the protection of victims of International Armed Conflicts.

- f. Prohibition of long term and widespread damage to environment and;**
g. Prohibition of the use of poisonous substances.⁷⁰

From the Islamic point of view, the same holds true of other weapons of mass destruction such as biological and chemical weapon as well conventional weapons like missiles and bombs. But as observed elsewhere in this write up, the principle of reciprocity, necessity and proportionality may allow the use of these weapons⁷¹ This explain why Muslims strive to possess these weapons where evidence abound that their opponent possesses same in line with the *Quranic provision which states:*

“Make ready for them all thou cast of armed force and of horses tethered, that thereby ye may dismay the enemy of Allah and your enemy and others beside them whom ye know not. Allah knoweth them. Whatsoever ye spend in the way of Allah, it will be repaid to you in full, and ye will not be wronged. And if they incline to peace, incline thus also to it, and trust in Allah. Lo! He is the hearer, the knower”⁷²

War Captives

The Prisoners of War Convention of 1929 had already ensured that it was forbidden to take measures of reprisals against prisoners of war. The Third Geneva Convention relating to the treatment of prisoners of war deals extensively with the plight of those taken captive in war, declaring that “Prisoner of war will at all times be treated humanely”⁷³ Prisoners of wars (POWs) are members of the armed forces of one of the parties to the conflict who fall with the hands of the adversary during an international armed conflict. They retain their legal status as members of the armed forces during their captivity an indicated externally by the fact that they are allowed to wear their uniforms, that they continue to be subordinate to their own officers – who are themselves prisoners of war and that at the end of hostilities they have to be returned to their own country without delay. It is moreover, explicitly stated that prisoners of war are not in the hands of individuals or military units, but are in the care of the adverse state, since it is the state, as a party to the Geneva Convention that is responsible for fulfilling its international obligation.⁷⁴ Being a prisoner of war is in no way a form of punishment. Other categories of persons listed in the third Geneva Convention as having the same status as members of the armed forces include members of a resistance movement belonging to a party to the conflict who satisfy the following four requirements;

- (i) They must be commanded by a person responsible for his subordinates;**

⁷⁰ For more details, See Advisory Opinion on the legality of the use of Nuclear Weapons (WHO’s case), ICJ (1996) Rep 66.

⁷¹ Whether or not they may arise a situation where the use of nuclear weapons becomes necessary is doubtful as indicated by the controversial opinion of the International Court of Justice (ICJ) on the issue. One thing is certain though; Muslim must strive to possess these weapons if their opponent have them.

⁷² Q 8: 60 – 61.

⁷³ Third Geneva Convention, Article 13.

⁷⁴ *Ibid*, Article 12.

- (ii) ***They must have a fixed distinctive sign which is recognizable at a distance (if they have no uniform of their own);***
- (iii) ***They must carry arms openly;***
- (iv) ***They must respect the law and customs of war.***⁷⁵

Certain persons authorized to accompany the armed forces without belonging to them such as civilian members of ship and aircraft crew, war correspondents, though not those journalists who are to be treated as civilians under the rules of Protocol 1 are also to be treated as prisoners of war.⁷⁶ Also entitled to be treated as prisoners of war are members of the population who spontaneously take up arms to resist approaching enemy forces (*Levee en masse*). If however, there is any doubt about the status of a captured person, such doubt must be cleared up by a competent tribunal.⁷⁷ The Third Convention also known as “The POW’S Convention” regulates to the smallest detail the treatment of prisoners of war.⁷⁸

Besides, the repatriation of prisoners of war is adequately provided for. The following three categories are however distinguished;

- (i) ***The severely wounded and sick must be repatriated directly and without any delay i.e. as soon as they are fit to travel. It is the duty of the mixed medical commissions to decide who will be repatriated.***⁷⁹ ***ICRC delegation posses however, the necessary experience to carry out such repatriations at any time.***
- (ii) ***All prisoners of war must be released and repatriated without delay after the cessation of active hostilities.***⁸⁰
- (iii) ***The parties to the conflict should, without waiting for the war to end, repatriate prisoners of war on humanitarian grounds, possibly on a reciprocal basis i.e. by means of an exchange of prisoners. ICRC constantly tries to bring such agreements about. As a neutral intermediary between the parties, ICRC is always prepared to carryout repatriation and exchanges of prisoner of wars (POW’s).***

In accord with Article 118 of the Third Convention, prisoners of war cannot refuse repatriation to their own country and they must be so repatriated. However, in case of difficulty, when POWs refuse to be repatriated as happened during the Korean War, it is the role of the ICRC to determine objectively each prisoners will. In this respect, ICRC take part in the repatriation of POW’s only if its delegates have really been able to verify that each prisoner’s decision was freely made. Unjustifiable delay in the repatriation of prisoners of war is a grave breach of Protocol 1,⁸¹ while release of a prisoner of war in parole is regarded as a chivalrous conduct.⁸²

⁷⁵ *Ibid*, Article 4 A(2).

⁷⁶ *Ibid*, Article 4 A(4) and (5).

⁷⁷ *Ibid*, Article 5 paragraph 2.

⁷⁸ For details see, third Geneva Convention, Article 21 – 108. See also for a brief summary of such detailed regulations, Hans Peter Gasser op cit Pp 33 – 38.

⁷⁹ Third Convention, Article 112.

⁸⁰ *Ibid*, Article 118.

⁸¹ Protocol 1, Article 85.4(b).

⁸² Third Convention, Article 21, paragraph 2.

In accordance with this custom, instead of being interned,⁸³ POW's may be freed on parole by the detaining power and sent back to their own country, as condition that they have solemnly sworn no longer to take part in the fighting against the state that had captured them.

Under Islamic Law, war captives are divided in the manual of Figh into 3 categories namely;

1. *Asra (POW's): people captured while they were taking part in actual combat. In other words, they are enemy combatants.*
2. *Saby: Women and Children of the enemies.*
3. *Ajazah: older and disable people .Hermits, Monks and priest are also included in this category.*

The general principle of Islamic law is that war captives must be treated humanely. The Glorious Quran states the qualities of a righteous Muslim as follows:

*“And (they) feed with food the needy, wretch, the orphan and the captive, for love of him, (saying); we feed you, for the sake of Allah only. We wish for no reward nor thanks from you: Lo! We fear our Lord a day of frowning and of fate.”*⁸⁴

The Holy Prophet (SAW) on the victory of Mecca gave these following imperatives:

“Do not attack the injured person: Do not follow the one who leaves the battle field: and do not kill anyone who is captured”.⁸⁵

Various Prophetic traditions emphasized good and human treatment of prisoners of wars.⁸⁶

In Islam, there's a seemingly disagreement amongst Muslim jurist of the various school of thoughts regarding the fate of prisoners of wars (POWs) under Islam.⁸⁷ Islamically, taking captives is legal in the Qur'an. The Qur'an provides:

⁸³ Internment is defined as the deprivation of liberty of a person that has been ordered by the executive branch – not the judiciary without criminal charges being brought against the internee. See commentary on Additional Protocols of 8th June 1977 to the Geneva Convention of 12th August 1949, ICRC/Martinus Nijhoff publishers, Geneva 1987, commentary on Additional Protocol 1 Art 75(3) Para, 3063. Under IHL applicable international armed conflict, internment (and assigned resident) is the most severe measure of control that a detaining authority may take with respect to person against whom no criminal proceedings are instituted. See Pejic J, “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence” published as Annex 1 to the ICRC's Report on “International Humanitarian law and the Challenges of contemporary armed conflict”, presented to the 30th International Conference of the Red Cross and Red Crescent held in Geneva in 2007. It is also prohibited in International Review of the Red Cross, Vol. 87 No. 858, June 2005, Pp 375 – 391. Also available at <http://www.icrc.org/eng/assets/files/other/irrc-858-pejic.pdf>. (Last visited on 5th April 2012).

⁸⁴ Q. 76: 8 – 10.

⁸⁵ Al Baladhar, *Futuh al – Buldan* (Cairo Maktabat al – Misriyah) 1957, P. 47.

⁸⁶ Muslim *Kitab al – Nadhr*, Hadith No. 3099. See also Ibn Hisham: Abdl malik, *Sirah al – Nabawiyah*, Beirut: Dar al Kutub al – Islamiyyah 1994 Vol. P. 215 – 17.

⁸⁷ Secondary works on Islamic jus in bello usually give some space to the issue of POWs but such works are not comprehensive. A good work is Gerhard Conrad, *Combatants and privies of war in classical Islamic law: concepts formulated by Hanafi jurist of the 12th Century*” In *Revue de Droit Penal Militaire et de Droit de la Guerre*, V.1 20, No's 3-4, 1981 Pp 271-307. This work is exclusively on POWS in Islam, but is not exhaustive and fails to elaborate the complex rule regarding POWS and the reasons behind the differences in opinion among early Muslim jurists. Another noteworthy study is that of Khalid Abou El-fadl (1999), “Saving and taking life in war; three modern Muslim

“... And then tighten their hand...”⁸⁸

Muslim jurist agree that the faith of prisoners of wars are left to the political authority to decide as he deems fit in the interest of the Muslim community. However, Muslim jurist diverge over the choices available to the Muslim state to terminate their captivity. The various options mentioned by Muslim jurist include execution, exchange, conditional on unconditional release, ransom, and enslavement. According, to the majority of Muslim scholars,⁸⁹ the political authority has the following options, execution, enslavement, Mann (unconditional release) and “fida” (ransom or release after setting a condition or demanding a promise).⁹⁰ The Malikites added a further condition to this and that is imposition of *Jizyah* (Poll tax) on them.⁹¹

The Hanafi jurist agree on execution, enslavement and setting captives free with the condition that they should pay *Jizya* but there is disagreement on ransom.⁹²

The Qur’an mentions the fate of POW’s in the Qur’an which says”

“Now when you meet (in war) those who are bent on denying the truth, smite their necks until you overcome them fully, and then tighten their bonds, but thereafter (set them free) either by an act of grace or against ransom, so that the burden of war may be lifted. Thus (shall it be).”⁹³

The above verse therefore renders execution illegal and makes captivity a temporary affair that must lead to which unconditional or conditional freedom, or freedom bought with ransom.⁹⁴ Then the political authority has the option of releasing prisoners against ransom or setting them free

views” In Muslim world, Vol. 89, No. 2, Pp 158-180, in which he discusses the work of three modern scholars of the twentieth century: see also Syed Sirajul Islam, “Abu Ghraib, prisoner Abuse in the light of Islamic and International law”, In Intellectual Discourse, Vol. 15, No. 1, Pp. 15-19. Works based on secondary sources include Yadeh Ben Ashoor, “Islamic and International Humanitarian law” In International Review of the Red Cross, No. 722, March – April (1980) Pp 1-11, especially Pp 3-7, and Troy S. Thomas (1997), “Prisoner of War in Islam: a legal Enquiry” In Muslim World Vol. 87, January, Pp 44-53. The first article briefly discusses the interpretation of Qur’anic verses regarding POSws unfortunately; the author does not give reference for many works discussed in his article. In the second work, the author has given a summary of Islamic law regarding POWs. A recent work in Arabic in Amour al Zemmali (ed), Maqalat fial-Qanun al-Duwali al-Insani wa al-Islam, 2nd edition, ICRC 2007. This is a compilation of fifteen essays primarily published in the international Review of the Red Cross on the various aspects of Islamic jus in bello, in some cases in comparison with international humanitarian law. A comprehensive examination of the subject of war by Ameer Zammali, Combatants et prisonniers de guerre en droit islamique et en droit international humanitaire (combatants and prisoners of war in Islamic law and international humanitarian law), Pedore, Paris, 1997.

⁸⁸ Q 47:4.

⁸⁹ Maliki, Shafi’I, Hambali, Shi’ite, Zahirite and Anzai.

⁹⁰ Muhammad Al-sharbinial khalib, Mughni al-muhtaj, Maktaba Mustafa al-Babi, Cairo 1933, Vol. 4, P. 228; Ali b. Ahmed b. Sa’eed b. Hazin, Al-Muhalla, Dar al-Fikr, Beirut, Vol. II Pp 97-98.

⁹¹ Muhammed b. Ahmed b. Rushd, Biayat al-Mujtahid, trans limran A. K. Nyozee, Garnet publishing Ltd, 1994 and Vol. 1 P. 456; Muhammad b. Ahmed is Juzii, al Qawanin al-fiqhiyya, Dar at Kutub al-ilmiya, Beirut P. 99; Ahmad b. Idris al-Qarafi, Al-Furuq (along with Idrar al – Suruq ala Anwa al furuq) Dar al-m’rifa, Beirut nd Vol 3. P 17.

⁹² Alauddin Abu Bakr al-Kasani (2000), Bada’I al-Sanai, Dar Ethia al-Tourth al-Arabi, Beirut, Vol. 6 P. 94

⁹³ Q 47:4.

⁹⁴ Q 8:67-68 of the Qur’an brought censure upon the prophet (PBUH) because no revelation attesting to their being lawful had been sent to him and because the companions were tempted by ransom. However as is mentioned in these verses, ransom was legalized in the following wordings: “Enjoy them, all this is lawful and good among the things which you have gained in war, and remain concern of God: verily God is much forgiving, a dispenser of grace”.

without any ransom.⁹⁵ This is supported by the instruction of the prophet (PBUH) that he gave while conquering Mecca thus:

“... Slay no wounded person, pursue no fugitive, execute no prisoner, and whosoever closes his door is safe”⁹⁶

Al-Hassan b. Muhammad al-Tamim. 656AH/1258CE has related that there is a consensus (ijma) of the companions that prisoners of wars shall not be executed.⁹⁷

According to authentic reports, in all the wars of the prophet (PBUH) only three to five⁹⁸ POWs were executed. Thus only Ugbah b. Abi Mu it was executed out of seventy captives of Badr,⁹⁹ for his crimes against the prophet (PBUH) and Muslims in Mecca.¹⁰⁰ The second was Abu Izzah al-Jumah in Uhd.¹⁰¹ The third prisoner of war was Abdullahi b. Katal, who was executed on the day that Mecca was conquered.¹⁰² All these people were executed because of the human crimes they had committed against the Islamic State before their captivity and were wanted criminals in the Islamic state (State of Medina) of which Muhammad (PBUH) was the head. It is clearly therefore never an established rule at the time of the prophet (PBHU) that POWS be executed. It is in the respect that it is argued that probably Al-Hassan b. Muhammad al-Tamimi struck a chord when he proclaimed that the companion of the prophet (PBUH) were unanimous on the prohibition of the killing of POWs.¹⁰³

⁹⁵ MUNIR M, “The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters under Islamic Law” International Review of the Red Cross Vol. 93, No. 881 March 2011 Pg. 90.

⁹⁶ Abu al-Abas, Ahmad b. Jabir al-Baladhuri (1916), Kitab futeh al Buldan tras. Philip Khuri Hitti, Columbia University, New York, Vol. 1 P. 66.

⁹⁷ Abdul Walid Muhammad ibin Rushd (1994), The Distinguihsed Jurist Primer, trans Imran Nyazee, Reading: Garnet Publishing Ltd, Vol. 1 P 456.

⁹⁸ However, the reports about the execution of al-Nair is al Hadith and one of the concubines of Abdullahi b. Khattal are less authentic.

⁹⁹ It is said that al-Nadr b. al-Harith was killed in captivity. According to Ibn Kathir, al-Madr was killed during the war. See Ismail b. Umar b. Kathir (1966), Al Bidya wa’al-Nihaya, Maktaba al-Marif Riyadh, Vol. 3, P. 35.

¹⁰⁰ Abdul Walid Muhammad Ibn Rushd, The Distinguished jurists primer op cit at P. 130.

¹⁰¹ He was set free in Badr on condition that he would stop his blasphemous poetry against Islam and not to fight the Muslims again. He broke the promise and again asked for pardon but this time he was executed. See Abu Bakr b. Ahmad al Sarkhari (2002), Kitab al-Mabsut ed, Sabir Mustafa Rabab, Dar Ihya al-Turath al-Arabi Beirut, Vol. 10 P. 26.

¹⁰² He was a Muslim living in medina but he killed an innocent Muslim, reverted to the pre-Islamic faith, joined the enemy and thereby committed high treason, embezzled public money, bought two concubines who would compose blasphemous poetry and starts a campaign against Islam. For the Islamic State there were many other wanted criminals, but they were all pardoned at their request. For details see Muhammad Munir (2003), Public international law and Islamic International law: Identical expression of world order in Islamabad Law Review, Vol. 1 Nos. 3 and 4, P. 382.

¹⁰³ This is also the opinion of a great many classical jurist including Abdullah b Umar (d. 73AH/692CE) Al-hassan al-Basri (d. 346/957CE), Ala, Dhak b Muzahim al-Hilali (d. 100 AH/718CE) and Ismail b. Abdulrahman, know as al-Sudi (d. 127AH/744CE) Ibn Rushd agrees with this opinion According to shi’a jurisprudence, the man has only three options, mann, fida (ransom either for money or in exchange for POWS held by the enemy) or enslavement. Shia jurists consider execution while in captivity illegal. See Najmuddin al-muhaqiq al-Hilli (2004), Sharia al Isma ed syed Sadaq al Sheraza Dar al Qari, Beirut, Vol. 1 P. 251’ and Sa’ib b. Habbat al-Rawandi (1985), Fiqh al Qur’an ed al-sayad Ahmad al Hussaini, Matba’a Ayatullah, Qum, Vol 1 P. 347; Zeinuddin b. Ali al-shahid al-sani (1983), Al-Rawdah al-Bahiyah fi sharh al humah al-Dimashqiqah, Dar ihya al-Twath al-Arabi Beirut, Vol. 1 P. 222.

The Third Geneva Convention of 1949 on Prisoners of War adopts a similar view regarding treatment of prisoner of war by giving the detaining power the rights to prosecute a prisoner of war for acts committed prior to his captivity against the detaining powers law.¹⁰⁴ Prisoners of war must however be released and repatriated without delay after cessation of active hostilities.¹⁰⁵

The established practice of the Prophet (PBUH) and his successors was to set POWS free unconditionally. Such release includes those of Thumama b Athal as well as eighty Mecca's fighters.¹⁰⁶ Similarly all the fighters of Hawazin, Hunayn, Mecca, Banu al mustala¹⁰⁷ Banu al Anbar, Fazara and Yemen were set free unless unconditionally. Abu Bakr – the first successor of the prophet (PBUH) released Al-Ashas b Qays (d 35AH/65CE) while Umar the second successor pardoned Hormazan (d. 23AH/643)CE) an Iranian commander.¹⁰⁸

Servants

Under Islamic Law, contractual, Suppliers and drivers are considered servants, they do not participate in hostilities and their killing is strictly prohibited. It is reported that when the prophet (PBUH) saw the body of a slain woman amongst the dead at the battle of Hunayn, he asked, who killed her? The companion answered, she was killed by the forces of Khalid Ibn al-Walid". The prophet (PBUH) told one of them "Run to Khalid" Tell him the messenger of God forbids him to kill children, women, and servants.¹⁰⁹ The Prophet (PBUH) is also reported to have prohibited in the strongest possible words of the Arabic language the killing of women, and servants, "Never, never kill a woman or a servant".¹¹⁰

To conclude, there are only two options regarding war captives: either grace or exchange.¹¹¹

Rights of prisoners of war in Islam

1. A prisoner of war has the right to remain in his religion and cannot be compelled to give it up. Today this principle refers to as freedom of religion.

¹⁰⁴ See Article 85

¹⁰⁵ See Article 118 of the Third Geneva Convention 1949. See also articles 109 and 111 of the same convention.

¹⁰⁶ Muslim, Sahih, Vol. 3 P. 1442, Hadith No. 1808; Yahaya b. Sharaf and Nawawi, Sharh Sahih Muslim, Matba Mahmud Tawfiq Cairo Vol. 7 P. 463.

¹⁰⁷ It is said that the captives of mustaliq ere first distributed among the companions but later, when the prophet (PBUH) married juwayriya al Harith (d 50AH/670CE), the daughter of the leader of the tribe, the companion set the captives free.

¹⁰⁸ Some 6,000 combatants of Hunayn were not only set free but each one of them was given a special Egyptian set of clothing as well. See Abu al-Abas Ahmad b. Jabir al Baladhuri (1924), Kitaqb futuh al Buldan Trans. Francis Clark Murgotten, Columbia University, New York, Vol. 2 P. 119 Umar also wrote to his commander to release the captives of Ahwaz and Mannadhir when there were captured. Ibid PP 112 – 114.

¹⁰⁹ Al-Tabrezi, Mishkat al-Masabih. al-Maktab al-Islam, Cairo nd. Hadith No. 3955; Ibn Mayah, Sunnan. Der Ehya Al-Turah Al-Arabi, Beirut n.d., Vol. 2 P. 101. For details, see forth Muhammad Munir, "Suicide attacks and Islamic Law" in International review of the Red Cross, Vol. 90, No. 869, March 2008, P. 85, also available at <http://www.ciicr.org/web/eng/siteengo.nsf/html/review-869-p71> (last visited 2nd October 2011).

¹¹⁰ Ibn Majah, Ibid. Vol. 2 P. 948, hadith No. 2842, 8625 and 8626. Abu Bakr al-Bashqi, al Sunnan al Kubra withel gawher al-Naqi, Dar al fikr, Beirut nd Vol. 9, P. 83.

¹¹¹ This is also the opinion of some of the prominent students of the companion of the Prophet: these include Al – Hassan Al – Bairi, Hamiad b. Salamah, Mujahid and Muhammad .b. Sirin, Kitat Al – Amwal P. 121.

2. Right to nourishment, enough to make his health. Denying nourishment to the prisoner of war is counted as a major sin in Islam. Since a prisoner cannot provide for himself, it is incumbent upon his captor to provide for him since Islam places the needs of a prisoner of war on the same level as the needs of the poor and the orphan.

3. He has a right to be clothed in dignity in a manner that is appropriate to his body station. It was reported that after the battle of Badr, prisoners of war were brought among them was Al – Abbas. He did not have a shirt on, so the prophet (Peace be upon him) looked for a shirt for him. It turned out that a shirt of Abd Allah b. Ubayy was the right size, so the Holy Prophet (SAW) gave it to Al – Abbas to wear and compensated Abdullah with his own shirt.¹¹²

4. Right to decent lodgings: whether they are in a prison cell or even a private home.

5. When families are taken together as prisoners of war, they have a right not to be separated. A mother should not be separate from her child, nor should that child be separated either. The Brother should not be separated either. The prophet (SAW) said regarding captives:

“Whoever separates a mother from her child will be separated from his own loved ones on the day of judgment”¹¹³

6. Prisoners of war have a right not to be subjected to any abuse or torture. They cannot be abused on account of the fact that they were fighting against the Muslim. Islamic Law does not command us to punish them for this reason.

CONCLUSION

Once it is believed that when the cannons roar, the laws are silent. Today, everybody knows better. In fact, the sheer number of international legal norms governing the conduct of hostilities is phenomenal. Legal themes like proportionality, indiscriminate warfare or the prohibition of mass destruction of weapons (to cite just a few examples) are bruited albeit not necessarily in legal terminology, by statesmen, journalist and lay persons around the globe. Some people, no doubt animated by the noblest humanitarian impulses, would like to see ***zero causality warfare***. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, sufferings and pains. The law of international armed conflicts does forbid some modes of behaviors in both the Geneva Conventions. Similar prohibitions can equally be found under Islamic Law with a view of minimizing the losses, suffering and pains and they in fact predate the prohibitions under the Geneva Conventions with greater observance in Islamic Law. The fundamental rules and principles of international humanitarian law relating to restriction on the means and methods of warfare, principle of proportionality, use of force, inviolability of civilian and non – combatant population and property as well as protection of the wounded, sick, ameliorate and captured combatants and or prisoners of war show striking similarities with that of the Geneva Conventions. However, issues of human shielding,¹¹⁴ deliberate and direct attacks against civilians, force displacement, maltreatment of persons detained in armed conflicts as well as lack of political will by belligerents to respect and prevent violation of international

¹¹² See Al – Bukhari, Hadith 3008.

¹¹³ See Al – Tirmidhi (1283), Ibn Majah (2250) and Abu Dawud (2696).

¹¹⁴ Perfidy under section 147 of Geneva Convention IV.

humanitarian law (IHL) are increasingly common area of concern to the extent that some considers Islamic laws and norms for the conduct of warfare as an alternative to international humanitarian laws.¹¹⁵

¹¹⁵ A number of current and recent armed conflicts have placed questions relating to the conduct of hostilities high on the agenda of legal and military debate. The time issues of targeting and the choice of weapons are the heart of the debate.