

The University of Hull

**The Legal Status of Prisoners of War in Islamic Law:  
Assessment of its Compatibility with the 1949 Geneva  
Convention Relative to the Treatment of  
Prisoners of War**

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## Abstract

Military confrontations in many parts of the world raise concerns regarding the treatment of prisoners of war. Whilst the regime of prisoners of war under international law is clearly codified in the 1949 Geneva Convention relating to the treatment of prisoners of war, questions arise, particularly from western thinkers, regarding their treatment under Islamic law. This thesis attempts to fill this gap in the literature. The legal status of prisoners of war as presented in the Quran and Sunna and interpreted by prominent Islamic scholars is analysed and compared with the Geneva Convention provision is examined.

The discussion begins in Chapter One with an examination of the context in which the issue of prisoner of war status arises. The concept and legitimacy of war are discussed and the rules of war, as well as relations between Islamic and non-Islamic States are examined. In Chapter Two, the definition of the term 'prisoners of war' in each legal system is examined, and the classes of people excluded from the definition are considered. Chapter Three investigates the legal status of prisoners of war from the moment of capture, with reference to the coercion of prisoners of war to reveal military secrets, protection inside the camps, the labour and financial status of prisoners of war, and the right to food and clothing, to communication with the outside world, to medical attention and to freedom of religious practice. There follows in Chapter Four a discussion of the ways in which capture may be terminated.

The thesis shows that Islam provides for the just and humane treatment of prisoners of war and its rules are in general consistent with the provisions of international law. There are, however, some differences, such as the Islamic provision on enslavement,

attributable to differences in historical context. Such discrepancies, however, have either been removed by changing custom, or can be resolved by analogy and by application of the general rules of just and humane treatment. There is, therefore, no reason why an Islamic country should not conform with the generally accepted principles of international law on the treatment of prisoners of war.

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- 1907 *Hague Convention No. IV Respecting the laws and Customs of War on Land* (Official Document), 1908, 2, A.J.I.L, p.90.
- 1907 *Hague Convention No .XI Relative to Certain Restrictions With Regard to the Exercise of the Right of Capture in Naval War.* [UKTS, 1910, No. 14 (Cd. 5118)]
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- 1918 *Covenant of the League of Nations*
- 1929 *Geneva Convention Relative to the Treatment of Prisoners of War.* [118, LNTS, 343]
- 1945 *Charter of the United Nations*
- 1949 *Geneva Convention Relative to the Treatment of Prisoners of War,* [75 U.N.T.S. 135]
- 1949 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* [75 U.N.T.S.287]
- 1949 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* [75 U.N.T.S. 31]



- 1949 *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, [75 U.N.T.S. 85]
- 1949 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, [75 U.N.T.S. 287]
- 1977 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. [1125 U.N.T.S. 3].

**Abbreviations**

A.J.I.L.....	American Journal of International Law
Cd.....	Command
Ch.....	Chapter
H. No.....	Hadith Number
H.Q. S. A.....	Holy Quran, <i>Sura</i> (chapter), <i>Aiah</i> (verse)
I.C.R.C.....	International Committee of the Red Cross
L.N.T.S.....	League of Nations Treaty Series
Pbuh.....	Peace be upon him
POW.....	Prisoners of war
U.K.T.S.....	United Kingdom Treaty Series
U.N.T.S.....	United Nations Treaty Series
U.N.....	United Nations
UK.....	United Kingdom
USA.....	United States of America
WW I.....	First World War
WW II.....	Second World War

## Introduction

Despite the scourge of the Second World War and the prohibition of the use or the threat of use of force in the Charter of the United Nations, war continues to exist. In our age, military confrontations have increased in many parts of the world, especially in Asia and Africa. These confrontations have resulted, *inter alia*, in many prisoners of war. Hence, the issue of prisoners of war has raised many controversial concerns, especially about their treatment. While the question of prisoners of war in general and their treatment in particular has been the subject of international concern and was codified in the Geneva Convention of 12 August 1949, and a number of studies have been conducted on the treatment of prisoners of war under international law (Allan, Rosas, 1976 and Levie, Howard S, 1978) little attention has been paid to their treatment under Islamic Law. Some studies (Elbakry, Mohamed Mokbek 1988 and Alsumaih, Abdulrahamn, 1998) have examined war in Islam (*Jihad*) and its aspects, but the issue of prisoners of war under Islamic Law has not been fully investigated.

The *Shariah* (Islamic Law) is a unique system of law, which operates in a manner distinct from the main types of legal system applied in non-Islamic countries, namely, the Roman system and the common law system. The Roman system relies on the detailed codification of legal principles, while in the common law system; law is developed in an evolutionary manner, relying to a great extent on cases and precedents. In both systems, the law is clearly man-made and is subject to revision. The *Shariah*, in contrast, is held to be a matter of divine revelation. As will be seen, there is provision in the system for a degree of interpretation, to apply the basic principles of the Quran and the Traditions of the Prophet Mohammed (peace be upon him, hereinafter pbuh) to the



circumstances of modern life. The essential rules of the *Shariah*, however, cannot be amended or revoked by Man.

It should be noted that some Islamic countries (e.g. Syria, Tunisia, Algeria) have, for historical reasons related to their former status as Western colony in the aftermath of the First World War, adopted Civil Codes which exist alongside the *Shariah*, particularly in areas such as commerce, with the possibility of tensions between the two systems. Other Islamic States claim the *Shariah* is adopted into the constitution and there is no other accepted course of law.

Within this context, questions may arise as to the legitimacy (from the Islamic point of view) of Islamic States entering into treaty obligations that are to supersede genuine Islamic teachings, in particular within this context, those concerning the treatment of prisoners of war (i.e. the Geneva Conventions). As already mentioned above, *Shariah* does provide for a degree of interpretation, to apply the basic principles of the Quran and the Traditions of the Prophet Mohammed (pbuh) to the circumstances of modern life. The signing of current international treaties and conventions that govern the relations between sovereign States is permissible under Islamic Law according to the views of many Islamic scholars, unless the obligations under them violate a fundamental rule of Islamic Law. Therefore, the question may emerge within this context as to the consistency of the provisions of international law (i.e. the 1949 Geneva Conventions) regarding the treatment of prisoners of war with Islamic Law, and whether there are any fundamental differences between the two systems. These issues have not so far been adequately addressed. There exist a few studies, such as Amer, Abdullateef (1986); Al-Shathlei, Mohammed Nabeil (1994) and Alsumaih, Abdulrahman (1995); which deal directly with the issue of prisoners of war in Islam.

However, there are many aspects of the subject which they address inadequately or not at all, such as the definitions of prisoners of war, the start of capture and the financial status of prisoners of war. Moreover, these writers did not compare Islamic law with international law. This study seeks to redress this oversight. It examines the legal status of prisoners of war in Islamic Law and compares it with their treatment in international law (i.e. The Geneva Convention related to the Treatment of Prisoners of War of 12 August 1949).

The significance of the study lies in its originality and contribution to knowledge. As indicated above, it will fill a gap in the existing literature by addressing in detail a hitherto neglected topic. It will be of particular interest to Western scholars who may have little knowledge of Islamic Law and its sources. The research will also contribute to international relations by clarifying the degree of consistency between the provisions of Islamic Law and international law, in regard to an issue which is of direct practical concern in an age when many parts of the world are experiencing armed conflict.

To achieve the objective of this study, a combination of approaches will be applied and used to maximum advantage. The study adopts descriptive, analytical and comparative approaches. Although there is a number of research methods commonly used in human studies, such as questionnaires, observations and interviews, these require the existence of specific cases for their application. At the present time, there is no united Islamic state which has prisoners of war; therefore, the above methods were not applicable. For this reason, the researcher found the descriptive method to be the appropriate one.

The descriptive analysis method allowed the researcher to review the Islamic law regarding the case of the prisoners of war, based on the writings of Islamic scholars.



As regards international law, the provisions of international conventions and agreements, and the interpretation of international law provide the basis for discussion. On Islamic Law, reference will be made to the principal primary sources of the *Shariah*, the *Quran* and *Sunna*, and to the work of Muslim jurists. The views of the four major Sunna schools of Islamic Law, the *Maliki*, *Hanafi*, *Shafi* and *Hanbali*, will be discussed. The interpretations of prominent Muslim scholars such as al-Shaybany, al-Mawardi, Ibn Taymaiya, Abu Zahra, al-Zuhili, Qutb and al-Qardawi will also be used.

The resources used were predominantly in Arabic. Whilst these sources were useful in reflecting Muslim thinking on the issues in question, they presented the difficulty that they required translation for the purposes of this study. Little has been written in English on the subject of this research.

An important feature of the sources used is that, because they reflect different schools of Islamic law, they contain conflicting interpretations. Therefore, a significant contribution of the research effort was the analysis of these differing perspectives. The argument of the scholars were subjected to comparative analysis and relevant proofs sought in the primary sources of Islamic law, the Holy Quran and the Sunna, in order to arrive at a synthesis.

The discussion of Islamic Law and the treatment of prisoners of war within the whole of this thesis is confined to the practice of the Prophet Mohammed (pbuh), since the teachings and practices of the Prophet, along with the provisions of the Holy Quran, form the primary sources of Islamic Law<sup>1</sup>.



There are other eras during the existence of the concept of the Islamic State, such as the Abassi, Amawi and Ottoman Empires, in which the treatment of the prisoners of war could have been examined as well. However, since the Prophet's practice (following the provisions of the Holy Quran) forms a primary source of Islamic Law, and since the practices of those empires in this respect were all based mainly on the Prophet's practice and, moreover, since covering the treatment of prisoners of war within those and other Islamic eras would be a very wide and complex task requiring more than one thesis, they are not included in this study.

The main body of the thesis is presented in four chapters. In each chapter, the relevant issue will be examined in the light of Islamic Law and international law in turn. Similarities and inconsistencies between the two systems will be highlighted in the conclusion section of each chapter.

Chapter One sets the research in context by considering first, the sources of Islamic Law from which the principles discussed in this thesis are derived. Attention is then paid to the circumstances in which the issue of prisoner of war status arises, in other words, the definition and legal status of war. The discussion focuses primarily on *Shariah*, an area which is less familiar to Western readers. Since the issue of prisoners of war is a direct result of armed conflict, particular attention is paid to the meaning of war (*Jihad*); the rules regulating war in Islamic Law and the nature of relations between Muslim and non-Muslim States.

During conflicts, many categories of people may fall into the power of the enemy. It is therefore necessary to clarify the scope of applicability of Islamic and international provisions related to prisoners of war. Thus, the term prisoner of war is discussed in

Chapter Two. How the term prisoner of war is applied in each legal system and the classes of people falling within the definition, as well as those excluded from it, are examined.

The discussion, in Chapter Three, focuses upon the regime of capture in Islamic Law and the Geneva Convention. The chapter contains two parts. The first is concerned with the system of capture, including the start of capture; the permissibility or otherwise of coercing prisoners of war to reveal military secrets; the protection afforded to prisoners of war and the method of imprisonment. Consideration is also given to the use of prisoners of war for labour, and to the financial status of prisoners of war.

The second part of the chapter contains an examination of the rights of prisoners of war in Islamic and international laws. Particular attention is paid to their right to food and clothing; to communicate with the outside world; to receive medical attention and to practise their religion.

Chapter Four examines the termination of capture during or after the conflict in both Islamic Law and international law. The termination of capture in international law involves the discussion of four modes: escape, release on parole, death, release and repatriation, (during or after the hostilities). The four modes of termination in Islamic Law are also examined. They are: death, release and exchange, enslavement and ransom, for either money or work.

The thesis concludes, by highlighting the main findings emerging from the foregoing analysis, their implications and recommendations for further research.

## **Endnotes to Introduction**

<sup>1</sup> In this regard, the Holy Quran comes before the Sunna as a primary source of Islamic law. See *infra* 1.1.2.2.



## **CHAPTER ONE:**

# **Preliminary Considerations on War in Islamic Law and International Law**

### **Introduction**

This chapter establishes the background of the study, by clarifying the context in which the issue of the treatment of prisoners of war arises. It does this by examining the concept and legality of war and the rules governing its conduct, as they appear in international and Islamic Law. Since Islamic Law is likely to be less familiar to Western readers, particular attention is paid to explaining its sources and modes of development and interpretation, as well as to the precise meaning of *Jihad* in Islamic Law and the way it differs from the general western concept of war.

The general principles of Islamic Law are founded in the Holy *Quran* and the *Sunna* (the traditions of the Prophet Muhammad). These fundamentals may be interpreted to meet the needs of changing circumstances, by scholarly consensus and analogical deduction. These four sources of Islamic rulings are discussed in the first section of the chapter. This background information is followed by two sections which examine definitions of war in international and Islamic Law respectively. The discussion then turns to the legality of war, and the rules regulating it, which again are presented for each legal system in turn. The remainder of the chapter addresses in more detail issues arising in relation to the Islamic

concept and regulation of war, namely, the classification of the world into two or three parts, ( *Dar Al-Islam*, *Dar Al-Harb* and *Dar Al-Ahd*) depending on adherence or opposition to Islam and the nature of relations between Muslims and non-Muslims.

## 1.1. The Sources of Islamic Law

Islamic jurists base their judgments on four main sources: the *Quran*, the *Sunna* (tradition), *Al-Ijma* (consensus) and *Al-Qiyas* (analogy). The role of each of these is explained in turn.

### 1.1.1. The Quran

The Holy *Quran* is considered the first and primary source of Islamic Law and the first book of the Muslims, and anyone wishing to understand Islamic legislation must turn to the Holy *Quran* before any other sources such as *Sunna*, *Al-Ijma* or *Al-Qiyas*.

The Holy *Quran*, Muslims believe, is so well known, as to need no definition. However, Islamic scholars give a description, rather than definition, of the *Quran*, as the very Word of God.<sup>1</sup> According to Al-Ghazali, the *Quran* is “the words of Allah, the miraculous, which were sent down to the Prophet Muhammad (pbuh), with its Arabic Letters and meaning, which were written in the Book, and transferred to us in isotonic succession”.<sup>2</sup> Furthermore, Denffer states that the *Quran* can be defined as “the words of Allah, sent down to the last Prophet Muhammad (pbuh), through the Angel Gabriel, in its precise meaning and precise wording, transmitted to us by numerous persons both verbally and in writing”.<sup>3</sup>

### 1.1.1.1. The Characteristics of the Holy Quran

From the majority of Muslims' point of view, the *Quran* has some characteristics that distinguish it from similar Divine Books such as the Torah or Bible or from the *Sunna*, which are as follows:

- 1) The *Quran* is a holy book especially directed to Muslims.
- 2) The words and meaning are from Allah. In this respect it differs from the *Sunna* whose meaning is from Allah but the wording is from the Prophet (pbuh). Allah said: "O Messenger! proclaim the (message) which hath been sent to thee from thy Lord. If thou didst not, thou wouldst not have fulfilled and proclaimed His mission". (H.Q. S5. A67).
- 3) The *Quran* was transmitted by (succession), that is, it was told by the Prophet to a large group of his companions and was passed on unaltered from generation to generation.
- 4) The *Quran* is protected from any change (from increasing or decreasing). Allah said: "We have, without doubt, sent down the Message; and We will assuredly guard it (from corruption)" (H. Q. S15. A9).<sup>4</sup>
- 5) The *Quran* is Miraculous. It is a miracle of the Prophet Muhammad.<sup>5</sup> It is a moral miracle and not a physical one, such as healing the dumb or the leprous, like the miracles of the Prophet Jesus (pbuh), or converting a cane into a walking serpent, which was the miracle of the Prophet Moses (pbuh). From Muslims' point of view, as a moral miracle, the *Quran* agrees with the whole *Shariah* and lasts for eternity. Things that happen all at once (like a physical miracle) are not seen by all people, and also do not prevail for generations that come after; people read or hear of them, but they cease to have immediate impact. As for the moral miracle, we can say that it is eternal, bears a miraculous meaning and the message remains alive to the Day of Judgment.<sup>6</sup>



The *Quran* is miraculous in its composition, its meaning and in its rulings which are superior to human rulings in accuracy, formulation, justice and the benefits conferred. The *Quran's* miraculous nature is reflected in the fact that when people were challenged to make up anything like the *Quran*, they could not do it. Allah says: "Say: "If the whole of mankind and Jinns were to gather together to produce the like of this *Quran*, they could not produce the like thereof, even if they backed up each other with help and support". (H. Q. S17.A88)

By God's will, each Messenger's miracle was of the kind appropriate to his people. For example, the Egyptians succeeded in magic, so Allah provided Moses (pbuh) with a miracle that looked like magic, whereby he threw his staff and it became a walking serpent. The people of Jesus (pbuh) succeeded in medicine but they could not cure the dumb or the leprous, so Allah gave Jesus (pbuh) the miracle of curing the dumb and leprous, and even the ability to revive the dead. Thus we find that the Arabs excelled in purity of language and eloquence. Therefore, the miracle of the prophet Mohammed (pbuh) is the miracle of his pure, eternal eloquence, so that this miracle will be valid throughout eternity, to the day of judgement.<sup>7</sup>

### **1.1.1.3. The Revealing of the Holy Quran (Gathering and Writing the Quran)**

The Holy *Quran* was not revealed all at once, but in stages, according to events and occasions over twenty-three years, in order that the human power could be prepared to accept that divine doctrine and to make it more easy for the Muslims to recite and write the Holy *Quran*. Allah said: "Those who reject Faith say: "Why is not the Quran revealed to

him all at once? Thus (is it revealed), that We may strengthen thy heart thereby, and We have rehearsed it to thee in slow, well-arranged stages, gradually”. (H. Q. S25. A32).

The Prophet Mohammed (pbuh) was accustomed to read the *Quran* to his companions after it was revealed to him. The companions of the Prophet competed in reciting the Holy *Quran* and recited the *Quran* in front of the Prophet (pbuh) for him to approve what they were reciting, and they taught those of their companions who had not witnessed the revelation and the Prophet (pbuh) encouraged them to do that. The Prophet (pbuh) said: “the best of you are those who learn the *Quran* and teach it”.<sup>8</sup>

The Prophet (pbuh) was not content with reciting the *Quran* but ordered some of his companions to write what was revealed during the time of revelation of the Holy *Quran* (those are known as the inspiration writers) and it was considered an exercise in authentication and accuracy, taking care to record the Holy *Quran* in order that nothing from it could be lost.

When the Prophet (pbuh) died (12/3/11 A.H. 6/6/632 A.D), the *Quran* had not been gathered into one book and what was written was scattered among his companions. In the period of the first Caliph, Abu Bakr (632-634 A.D), and after the *Redda Wars*<sup>9</sup>, many companions, who had been the readers and reciters of the Holy *Quran*, were killed. It was feared that the *Quran* might be lost once those who recited it died. It was therefore ordered in the year thirteen of *Al-Hegra* <sup>10</sup> (634 A.D) that the *Quran* be gathered in one book.<sup>11</sup>

The one who gathered the *Quran* was Zaid Bin Thabet, may God be pleased with him<sup>12</sup>, and he was helped in this endeavor by a group of companions. They wrote the *Quran's* Chapters (*Souras*) and Verses in order and accurately as they had been recited in front of



the Prophet (pbuh). In that way the *Quran* was preserved and transmitted to us.<sup>13</sup>

#### **1.1.1.4. The Nature of the *Quranic* Legislations:**

When we follow the rules (laws) presented in the *Quran*, we find that mostly the *Quran's* explanation of rules is general, not given in detail. For example, the rites such as prayers, Zakkah<sup>14</sup> and Hajj<sup>15</sup> are mentioned in the Holy *Quran*, but we do not find how to pray or how many bows to perform. The *Quran* also did not mention the sum of money on which Zakkah must be paid, nor the amount of Zakkah payable. Therefore, we need the *Sunna* to know the details of our worship. However, the *Quran* is not lacking in details about decisions (rules) where the rules do not need any supplement from the *Sunna*, such as the inheritance rules, and any part of the rules of behaviour that remain unchanged, such as the order to fulfil an obligation completely and the ban on usury. The philosophy underlying the *Quranic* legislation in that respect is that general, flexible principles are laid down so as to contain what people need at all times and places, while allowing for the fact that as time passes and nations develop, needs and interests vary. However, if the needs and interests do not change, with a change in time or place, the decisions come in detail in the Holy *Quran*.

In the light of this flexibility, it is necessary for diligent Muslims (*Al-Mujtahideen*) to deduce the rules applicable to contemporary circumstances according to what achieves the people's service and assures their happiness, within the framework of the general principles and the whole rules that the *Quran* contains. They should not be shocked by the fact that some rules in the *Quran* appear only partial, because the general rules and principles do not differ with the difference of time and environments, but what differ are the details of application.<sup>16</sup>

### 1.1.2. The Sunna

The *Sunna* in ordinary usage means the way (line) of good or bad conduct. In that respect, the Prophet said: “If someone performs a good Sunna (behaviour) he would have its reward and the reward of anyone who follows that example until the Day of Judgment. And if someone performs a bad Sunna (behaviour) he would bear its misdeed (sin) and the sin of everyone who copied it to the Day of Judgement”.<sup>17</sup>

In Islamic Law, *Sunna* means all that issued from the Messenger of Allah Muhammad (pbuh) in the way of saying, deeds or settlement.<sup>18</sup> It can also be defined as: all the sayings and deeds of the Prophet Muhammad, and those actions or practices of which he tacitly approved.<sup>19</sup>

The *Sunna* is considered the second main source of legislative rules after the Holy *Quran*. Many verses of the Holy *Quran* indicate that. Allah says: “and We have sent down unto thee (also) the Message; that thou mayest explain clearly to men what is sent for them, and that they may give thought”. (H. Q. S16.A44). Therefore the mission of the Prophet (pbuh) was to indicate the meaning of the Holy *Quran* and explain its rules. The *Sunna* is a completion of the Holy *Quran* and necessary for people to know Allah’s will. Also Allah said: “Nor does he say (aught) of (his own) Desire. It is no less than Inspiration sent down to him” (H.Q.S53. A2-3).

This verse shows that every instruction pronounced by the Prophet is inspired by Allah.

Allah said: “So take what the Messenger gives you, and refrain from what he prohibits you”. (H. Q. S59. A7). And also Allah said: “O ye who believe! Obey Allah, and obey the Messenger” (H.Q.S4.A59). And He said, “He who obeys the Messenger, obeys Allah.” (H.Q.S4.A80). These verses indicate that obeying the Prophet (pbuh) is considered equivalent to obeying God.<sup>20</sup>

#### **1.1.2.1. Recording of the Sunna**

The *Sunna* was not recorded in the lifetime of Prophet Mohammed (pbuh) because of a fear that it would be mixed with the Holy *Quran*. Also, because the Prophet (pbuh) was present among his companions, they could ask him for guidance when necessary.<sup>21</sup> Some work to preserve the *Sunna*, however, had begun in the lifetime of the Prophet (pbuh) through the transmission of what the Prophet taught. Moreover, letters that the Prophet wrote, and treaties he entered into, were put down in writing.<sup>22</sup> When the Prophet (pbuh) died, his companions took up their responsibilities in management and judgeship. The need then appeared for the *Sunna*, since the law that Allah revealed is impossible to apply without the *Sunna*. The *Quran* contains the general meaning, leaving the details to be clarified in the *Sunna*.

In the reign of Abu Bakr (630 A.D) (may God be pleased with him) when he took the decision to fight those who refused to pay Zakkah, he made that decision based on the *Sunna*. He could not take the dangerous decision to fight based only on a general *Quranic* text that commands Zakkah. It is understood from that, that Abu Bakr referred to the *Sunna* to clarify the amount of Zakkah and its kind.



There were also many other events that showed the companions' reliance on the *Sunna* in applying the legislative rules. They were doing their best to maintain the tradition of the Prophet (pbuh). For example, during the reign of Abu Bakr, when a grandmother asked about her inheritance, he said: "I did not find anything in the Holy Book", then he asked the people if they knew of any precedent in the actions and sayings of the Prophet. Al-Moghera Bin Shoabh stood up and said: "I heard the Messenger of Allah (pbuh) gave her a sixth," then Abu Bakr said: "Did you have anyone with you?" Mohammad Bin Maslamah supported what he said. Then Abu Bakr carried it out for her.<sup>23</sup>

Another example was, when Abu Mousea Al-Ashari asked permission to enter Omar's house (second caliph 634-644 A.D) three times but he did not answer him, so he turned back and Omar immediately sent after him and asked him, "Why did you turn back?" He said: "I heard the Prophet (pbuh) say: "If one of you greet someone three times and he does not answer, he must return". Omar requested confirmation that Abu Mousea had heard that speech from the Messenger, and a group of companions witnessed that they too had heard it.<sup>24</sup>

The significance of the *Sunna* compelled the companions to take care of it after the death of the Prophet (pbuh). Related to this endeavour to maintain accuracy, the jurists took steps to ensure that the Hadiths are sound. The basic idea was that the text (*matn*) of the Hadith should be supported by evidence of the chain of transmission (*Isnad*). Another Science has also arisen called the "science of men" which scrutinises the narrators of the *Sunna*, in terms of their reputation for honesty, their motivation, and their situation.<sup>25</sup>

Some writers claim that the concern for the *Sunna* did not begin until the reign of Omar Bin



Abdul-Aziz at the end of the first century of *Hegra* (96-101 AH) and that there was a need for it at that time.<sup>26</sup> They give the following arguments:

1- The transmission of the *Sunna* cannot be accurately traced to the Prophet Mohammed (pbuh) because of the long period between the period of the Prophet and the *Sunna*'s being written down.

2- These *Sunna* are the companions' efforts and opinions put in a modern form and with the chain of authorities made up to enhance the appearance of credibility.

It is obvious that these conclusions depend on the supposition that the first generations of the companions did not take care of the *Sunna* because no need for it appeared until the end of the first century of *Hegra* (718 A.D), but this supposition has no basis. These writers assume that the companions did not regulate their social life and behaviour according to the rules of the *Sunna* until the second century of *Hegra* (815 A.D), that Islamic Philology did not start until then, and that the pre-Islamic customs dominated almost all the period of the first century of *Hegra*. This is not correct, as is clear from the preceding account.

The claim that it was in Omar Ibn Abdul-Aziz's time that concern with the *Sunna* began has no justification from an academic point of view; although the concern at this time differed in degree, all previous Imams (heads of the Islamic State) and presidents of the Islamic nation were also concerned with this matter.<sup>27</sup>

### 1.1.2.2. The relation of the Sunna with the Quran

In the light of what has been discussed in the *Sunna*, its relation with the *Quran* covers three aspects:

1) The *Sunna* provides agreement and support for rules laid down in the *Quran*. These include, for instance, rules concerned with the duty of prayers and paying Zakkah; the commands against annoying one's parents and treachery; killing humans without right and the like.

2) The *Sunna* clarifies and interprets the rules that come in the *Quran*. Allah has accorded the Prophet (pbuh) the right to provide illustration of the texts where necessary. Allah says: "and We have sent down unto thee (also) the Message; that thou mayest explain clearly to men what is sent for them, and that they may give thought". (H. Q. S16.A44). For example, the *Sunna* gives details about how to perform prayer, about paying Zakkah and about going to Makkah for Hajj. This is needed because the *Quran* orders performance of prayers, paying Zakkah and pilgrimage, but in the *Quran* we cannot find details about, for example, the number of bows (prostrations) for prayers, or the amount of Zakkah, or the ceremonies of pilgrimage.<sup>28</sup> Furthermore, what is mentioned in the *Sunna* qualifies the general principle of the *Quran* in specific cases. An example is that the *Quran* refers to the son's inheritance in the saying of Allah, "Allah (thus) directs you as regards your children's (inheritance)" (H. Q. S4. A11). But in the *Sunna*, the Prophet (pbuh) says: "there is no inheritance for murder" so a rule is derived from the *Sunna*, that a son who has killed his father cannot inherit from him.

3) The *Sunna* establishes rules that the *Quran* did not explicitly mention. This kind of *Sunna* appears in the tradition that allowed pawning in the cities, or the tradition that prohibits the wearing of silk and gold rings for men.<sup>29</sup>

### **1.1.3. Al-Ijma (The consensus of opinions)**

Since the *Quran* and the *Sunna* could not cover every contingency, nor could rules of conduct that were adequate for the simple life of the Medina serve to regulate later society, the need was found to develop a body of law which would cover every imaginable circumstance, without losing contact with its sacred and unimpeachable sources. To this end, *Ijma* and *Qiyas* were evolved.<sup>30</sup>

The idea of *Al-Ijma* rests on the consultation principle that is legislated in Islam. It is a basic matter in Islam, since the *Quran* recommends it, although the *Quran* did not define a special phase or model for the consultation, owing to the difference in consultation systems in different nations and times. It did not stipulate the number of opinions required to establish consensus. Furthermore, the Prophet (pbuh) did not consult everyone or all the companions, but he consulted concerned persons of mature opinions. The Prophet (pbuh) said, “My community will never agree upon an error”.<sup>31</sup>

#### **1.1.3.1. The definition of Al-Ijma:**

*Al-Ijma* can be defined in Islamic Law as the unanimous agreement of the *Mujtahideen* (scholars) of the nations of the Prophet Muhammad (pbuh), after his death, in a particular



age, on a legislative rule.<sup>32</sup> This definition contains the conditions on which *Al-Ijma* is applicable as follows:

- 1) Agreement of the *Mujtahideen*; The *Mujtahideen* are those people who are well versed in Islamic Law and who are qualified in matters of the *Shariah*.
- 2) The *Mujtahideen* must be from Muhammad's (pbuh) nation; the opinions (Al-Ijma) of scholars from another nation are inadmissible.
- 3) In a particular age; this phrase indicates that *Al-Ijma* must be established in one generation.
- 4) *Al-Ijma* applies only to a legislative matter. Non-legislative matters, such as matters of customs or work, are not areas to which *Al-Ijma* is applicable.<sup>33</sup>

### 1.1.3.2. Kinds of Al-Ijma

There are two kinds of *Al-Ijma*. They are:

- 1) Direct *Ijma* (*Al-Ijma* al-Sareeh): Ahmad Mohammad Al-shafie defined it as, the agreement of the *Mujtahideen* on a legislative rule, arrived at and pronounced explicitly.
- 2) Indirect *Ijma* (*Al-Ijma* al-Sukuti) or silent *Ijma*: Ahmad Farrag Hussein has defined it as a saying of some of the *Mujtahideen* in one age or time, and the silence of the others after reading of this saying; in other words, absence of opposition or dispute.<sup>34</sup>

### **1.1.3.3. The Field of Al-Ijma:**

*Al-Ijma* is concerned with the practical legislative rules that are not covered in texts from the *Quran* or *Sunna*, and this includes rules offered to Muslims on matters like the matters of government and new phenomena. From that we find that the companions (may God be pleased with them) agreed after the death of the Prophet (pbuh) on the necessity of the Caliphate. Finally, it should be understood that even though *Al-Ijma* is an independent source, standing by itself. it must be supported, however, by a text from the *Quran* or the *Sunna*.<sup>35</sup>

### **1.1.4. Al-Qiyas (analogy)**

*Qiyas*, literally, means comparing with, or measuring by, that is to say, to compare one thing with another thing. It can be used in the settlement between two things, whether sensory or moral.

In Islamic Law, *Qiyas* means the adjunction of an occurrence or fact, for which no ruling text exists, with another fact for which has there is an explicit decision in the *Quran* or *Sunna*, based on the equality of the two occurrences in the rationale underlying the rules.<sup>36</sup>

#### **1.1.4.1. The basic elements of Qiyas:**

*Qiyas* has four basic elements:

- 1) The origin, as a standard. This is the case for which the rule is stated.
- 2) The branch, as a resemblance or similar case. This is the occurrence for which a rule is sought, but for which there is no directly related text from the *Quran*, *Sunna* or *Ijma*.
- 3) The rule (principle) of the origin. This is what is proved in the *Quran*, *Sunna* or *Ijma*.
- 4) The cause. This is the intention that provides a link between the origin and the branch.<sup>37</sup>

*Qiyas* is considered one of the important sources of the Islamic legislation. It is based on the principle of the legislator's construction of rules (the law giver is Allah) which is only legitimised for the purpose of achieving a benefit or removing injury or difficulty; all the rules of the Islamic legislation are due to one of these matters.

When a *Mujtahid* faces a new problem and wants to know the appropriate legislative decision, he first looks at the *Quran* and the *Sunna* and *Ijma*, and if he does not find any direct text governing this matter, he must search for a parallel situation regulated by the *Quran*, *Sunna* or *Ijma*. If he finds such a case and knows the cause of the decision, and sees that the same issue is at stake in the new problem that faces him, he may be satisfied that this decision is also suitable to the new case.

Yet it is not necessary for the *Mujtahid* to find an exact match for the new case. It suffices that the same sort of benefit (advantage) be conferred by the legislator. For example, if he finds that the legislator (Allah) allowed a particular behaviour from a group of similar behaviours to meet a need of the people, he will assess the rightness of another demeanour



by establishing that it meets the same need.

This gives Islamic Law the ability to deal with new needs and situations that are not mentioned explicitly in the Holy *Quran*, *Sunna* or *Ijma*, so that life remains subject to the decisions (rules) of Allah.<sup>38</sup>

The purpose of this outline has been to clarify for non-Islamic readers, in particular, how *Shariah* rules are arrived at and interpreted, in order to facilitate understanding of the discussion of particular rules in the rest of this thesis.

We now introduce the specific area of law with which this study is concerned, the law of war. The question of prisoners of war status, and its implications for captor and captive, arises only on the context of an armed conflict classed as war. Not all fighting an aggression constitutes war, in either Islamic or international law. Both systems of law contain rules regarding what constitutes war, whether or when war is permissible, and how it should be conducted. Such rules will determine when the issue of prisoners of war status, and the associated right and responsibilities arise. For this reason, the remainder of this chapter is devoted to clarifying these rules. The definition of war, and the rules regulating war, are discussed in turn, first from the more familiar perspective of international law and then from the perspective of Islamic Law.

## **1.2. Definition of War in International Law:**

It is important to distinguish between war and peace in order to demarcate when the laws of war are to be applied in place of the law of peace between the parties. The Charter of the United Nations does not use the term “War”, but refers instead to terms such “use of force”, “breach of peace” or “act of aggression” and “armed attack”.<sup>39</sup>

Many definitions of war have been put forward, but none is universally agreed in international law. Oppenheim, for instance, defines war, as “a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such condition of peace as the victor pleases,”<sup>40</sup> while Berriedale defines it as, “essentially a struggle between States, involving the application of force”.<sup>41</sup> Clausewitz, on the other hand, defines it as “an act of violence intended to compel our opponents to fulfil our will”.<sup>42</sup>

When we look at these definitions of war, we find that there are four major components or elements in war:

A- International Law recognizes two kinds of war: inter-State wars, which are waged between two or more States, and intra-State wars (civil wars), which are waged between two or more groups of the same society. According to these definitions, war cannot exist unless two or more sovereign States have an armed contention. So, if a contention arises between the armed forces of a State and a body of armed individuals, it is not considered as a war in a legal sense but called civil war.<sup>43</sup> Oppenheim said: “In the middle ages, wars

between private individuals, so-called private wars, were known, and wars between corporations-as the Hansa, for instance- and States. But such wars have totally disappeared in modern times. A contention may, of course, arise between the armed forces of a state and a body of armed individuals, but this is not war".<sup>44</sup>

B- The motive of war. The second component in these definitions concerns the purpose of war, answering the question, why is a war waged? For a war to exist, a constituent element is the goal, which the war is waged to achieve (the overpowering, to do our will) and when war loses that goal, it will not exist, according to these definitions.

The goal or the cause of war could either be a total or a limited one. Total war has as its aim the capitulation of the enemy, following the overall defeat of its armed forces. The goal of a limited war, however, can be confined to the defeat of some segment of the enemy's armed forces, or coercion of the enemy Government to alter a given policy.<sup>45</sup> Opinions differ on whether the United Nations could be a party to a war. But it is a fact of the twentieth-century that a victor is no longer entitled to impose whatever conditions he wishes, and there are limits to his rights over the vanquished.<sup>46</sup>

C- The third constituent element of these definitions is the intention of the parties to wage war. War cannot exist in the legal sense if there is no intention between the parties to suspend all peaceful relation and replace it by a state of war. This intention may appear from a clear declaration of war or ultimatum, also a demand on third states to observe the laws of neutrality.

The 1907 Hague Convention III stipulated that war cannot commence without previous and





explicit warning in the form of a declaration of war or an ultimatum.<sup>47</sup> Arguably, this intention is obvious if a declaration of war is issued but, what about in the absence of a declaration?

Werner Meng states that: “The *animus belligerendi* does not involve circular reasoning, as is sometimes asserted. Rather, it is concerned with establishing a clearly defined legal state, a status inter se with effects *erga omnes*. This state can be expressly declared to exist, but it can also be deduced from the nature and extent of hostilities”.<sup>48</sup>

Thus, it is possible that parties may deny that they are in a state of war, even though there are clashes between their armed forces, as happened in 1798 when the United States engaged in armed action against France and after two years they denied they were in a state of war. Also, in 1982, during the Falklands conflict between the United Kingdom and Argentina, then the British Prime Minister said: “A state of war does not exist between ourselves and the Argentine”.<sup>49</sup>

D- The last element in these definitions is a clash of arms between the parties to the conflict. Therefore war does not exist if there is no armed force employed by the opposing parties. Consequently, we must distinguish between two types of war, war in the material sense and war in the legal sense. According to Quincy Wright, war in the material sense refers to any use of armed force on a large scale. War in the legal sense is designated “lawful war” or a “state of war”. War in the legal sense is distinguished from peace by qualitative differences.<sup>50</sup> Furthermore, Lord McNair argues that: “A state of war may perfectly exist even if no armed force is being employed by the opposing parties and no actual hostility between them is occurring. Conversely, force may be used by one state

against another without any state of war arising”.<sup>51</sup>

From the above discussion, it is clear that classical international law's definition of war does not cover all kinds of armed conflict such as rebellion and revolutions, which might arise within a single State. Even if they are recognised by international law, however, the rules applicable to those conflicts are different from the law of war and the rules relating to inter-state war. And if we accept the classical concept of war, we will not apply the law of war in these conflicts and we will deny the combatants' and civilians' right to humane treatment. However, if we consider the purpose of the law of war, which is to limit suffering, and to provide humane treatment for all persons, whether they took part in the fighting or not, we will adopt the opinion which holds the broad concept of war (war in the material sense) to include all kinds of conflict, whether international or civil war, whatever was the intention of that war, and whatever its goal was. So as soon as a conflict takes place, we should consider it a war for the sake of the application of international humanitarian law.

This opinion is supported by some international charters, which have avoided mentioning war in the classical sense. Article 2 (4) of the United Nations Charter, for instance, provides that “All members shall refrain in their international relations from *the threat or use of force* against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”. [Emphasis added] This article does not use the word “war” which has a technical meaning. Instead the term “the use of force” is used, which means that the article will apply to all kinds of conflict. Furthermore, Article 39 of the Charter stipulates that: “The Security Council shall determine the existence of any *threat to the peace, breach of the peace, or act of aggression* and shall make recommendations”. [Emphasis added] Again, the Article does not directly

mention the war in the legal sense and the Security Council will exercise its authority to maintain peace in the case of a threat of peace, breach of peace or act of aggression.

Also in this regard, the four 1949 Geneva Conventions<sup>52</sup> stretched the meaning of war. They did not stop at the classical concept of war but adopted the concept of actual war demarcated by the norm of commencement of conflict on the battlefield, which need not to be between States. For example, Article 2 of Conventions indicated that “The present Convention shall apply to all cases *of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*”. [Emphasis added] Moreover, Article 3 of the Conventions use the phrase “armed conflict not of an international character....”.



### 1.3. Definition of War (*Jihad*) in Islamic Law:

War (*Harb*), invasion (*Qazuo*) and *Jihad* are all terms used in the Arabic language and they often mean one thing, that is, fighting the enemy.<sup>53</sup> In the Holy *Quran*, the term *Harb* (war) was used to mean fighting.<sup>54</sup> Allah said: “Every time they kindle the fire of war, Allah doth extinguish it” (H.Q.S5, A64). That means, wherever people gathered for war and raised an army for it, Allah separated their group and went out with them, and they did not get anything or return with any benefit.<sup>55</sup>

However, *Jihad* literally has a broad meaning. It is derived from the verb *Jahada* which means taking pains, striving, exerting and it has connotations of energy and power; it is taking pains in getting a desired thing.<sup>56</sup> Al-Qaderi, for example, indicated that the word *jihad* has more than twenty meanings in the Arabic dictionaries<sup>57</sup>, while Haykal gives a definition of *jihad* in the literal sense. He argues, “It is to exert oneself to the utmost in conflict between two parties”.<sup>58</sup> According to this definition, the painstaking may be a physical action, with arms or without, with or without money, it may be in words, or it might be by refusing to perform an action or saying, if one is ordered to do or say something illicit. Accordingly, the opponent that Muslims fight is the devil, the soul or misbelievers.

The word *jihad* is mentioned in the Holy *Quran* more than thirty two times. However, in the Makkah *Quranic* verses, it is used in the general sense of striving, such as the striving of parents to force their children to worship a god other than the true God. Allah says: “We

have enjoined on man kindness to parents: but if they (either of them) strive (to force) thee to join with Me (in worship) anything of which thou hast no knowledge, obey them not” (H. Q. S29. A8). Another use, in the Makkah *Quranic* verses, refers to calling unbelievers and arguing with them based on the *Quran*. Allah says: “Therefore listen not to the Unbelievers, but strive against them with the utmost strenuousness, (with the Quran)”. (H. Q. S25. A52).

On the other hand, in the Medinah verses, the term is used with the meaning of fighting unbelievers.<sup>59</sup> For instance, Allah said: “Go ye forth, (whether equipped) lightly or heavily, and strive and struggle, with your goods and your persons, in the Cause of Allah. That is best for you, if ye (but) knew.”(H. Q. S9. A41). And He says: “Not equal are those Believers who sit (at home) and receive no hurt, and those who strive and fight in the cause of Allah with their goods and their persons.” (H. Q. S4.A95).

In a legal sense, Islamic classical jurists have given *Jihad* a number of definitions ranging from “Doing our best and exerting energy for the sake of Allah by soul, money and tongue”<sup>60</sup> to “The fighting of unbelievers by Muslims, to preserve the word of Allah”.<sup>61</sup>

However, it is believed in Islam that *Jihad* (fighting unbelievers) is the smallest *Jihad*, while, the biggest is to struggle against the soul. Therefore, the Prophet of God (pbuh) said when he returned from fighting unbelievers: “we returned from the smallest *Jihad* (minor *Jihad*) to the biggest *Jihad* (major *Jihad*)”. Ibn al-Qayyim stated “*Jihad* against oneself is placed at the head of *Jihad* against the outside enemy; a person who cannot make *Jihad* against himself cannot wage *Jihad* against his enemy”.<sup>62</sup>



This is the meaning of *Jihad* in Islam. It appears that *Jihad* was imposed upon Muslims to free mankind from unjust oppression. This is unlike war, and Islam prefers the word *Jihad* which is wider in meaning than the word war, which means mere struggle. Therefore, *Jihad* is an Islamic word.<sup>63</sup> Khadduri said, “Islam abolished all kinds of warfare except the *Jihad*...No other form of fighting is permitted with or without the Muslim brotherhood”.<sup>64</sup>

By looking at the definitions of *Jihad* and war in international law, it can be noticed that they agree in serving the general advantage of the country and being addressed towards an external enemy. However, the difference between them is in their motivation. War in international law is resorted to for physical purposes, as the affairs of the country require, and each country pursues self-benefit, based on love of power and material gain.<sup>65</sup> In contrast, in Islam, the motive of *Jihad* is to spread Islam, repel aggression or suppression against Muslims and secure release from the unfairness of governors who stopped the spread of Islam.<sup>66</sup>

Furthermore, the term *Jihad* does not apply to every struggle. It refers only to a struggle for the cause of Allah. This is an essential condition for *Jihad* in Islam.<sup>67</sup> This condition is supported by the *Sunna*. The Prophet was asked about some people performing the same war with the same army, but one of them is fighting simply because he wants to be with his people against their enemy. Another is fighting for a personal pride, and one fights simply to show that he is a brave, and yet another in order to maintain appearances. He was asked who could be described as fighting for Allah's cause. His answer was most revealing: “He who fights in order to make Allah's law supreme fights for Allah's cause”.<sup>68</sup>

Moreover, another difference between the word *Jihad* and war in international law is that



there is a restriction in international law whereby the term war applies only to conflict between countries. Such a regulation was not known in the first Islamic period. Therefore, and according to the definitions given by Islamic jurists for *Jihad*, it is not a prerequisite that war must take place only between States, as classical international law demands.

Therefore we find that wars occurred between the Islamic authority in Madina and those who claimed prophecy inside the Islamic State, such as Musailma AlKadab (The Liar), Toliha AlAsadi, AlAswad AlAnsy and Sujah. According to Islamic scholars, these wars are named the *Reddah wars*, while in the classical international law conceptions of war, these cannot be considered as either internal nor international wars. On the other hand, it is obvious that there were wars which would be considered internal according to the international conception, such as the wars that took place between Ali Bin Abi Talab (the fourth caliph 656-661 A.D) and Moawya Bin Abi Sofian (may God be pleased with them). These are not known by Islamic jurists as Jihad, but rebellion, as Jihad refers to fighting against an external enemy. In short, we find that *Jihad* differs from war, despite having a similar linguistic meaning.<sup>69</sup>

Finally, *Jihad* is a collective duty (*Fard Kifaya*), which is obligatory on the Muslim community as a whole, though it is sufficient that a certain number of the able men perform *jihad*.<sup>70</sup> Allah says: "It is not for the Believers to go forth (all) together: if a contingent from every expedition go forth to devote themselves to studies in religion, and admonish the people when they return to them,- that thus they (may learn) to guard themselves (against evil)". (H. Q. S9. A122). However, *Jihad* is also an individual duty (*Fard Ayn*) in the sense that, if an enemy invaded the Muslims' land, if a Muslim is present at the clash, he is not

permitted to leave it. It is the head of the Islamic State who appoints the Muslim army or part of it.<sup>71</sup>

### 1.3.1. The Misconception of Jihad:

Some orientalists and opponents of Islam argue that *Jihad* means aggressiveness towards non-Muslim people. Non-Muslims used to translate the word *Jihad* as “heavenly war”<sup>72</sup> and they interpreted it in an abominable light until the word became associated with aggressiveness, savagery and bloodshed. Muslims were depicted as strong savage vultures, waiting to descend on the whole world with hearts full of envy and intolerance. Higgins, for instance, argues that “... against Jews and Christians, the war was to be continuous and unremitting: this was known as the doctrine of the *Jihad*”.<sup>73</sup> It was feared that Muslims intended to get rid of civilization, destroy the innocent and drive away the children and women, who would have no protection or escape except by proclaiming Islam<sup>74</sup>.

However, that view is not correct. *Jihad* is intended to be a wise tool in the Muslim’s hand, and not a bad means to dominate the world or other religions and change the enemy’s country (*Dar Al-Harb*) into an Islamic country without any justification, as some writers claimed.

The Holy *Quran* is quite clear on the point of converting an unbeliever to Islam, and what method should be utilized. It prohibits the use of force. In the words of the Holy *Quran*, Allah says: “There is no compulsion in religion” (H. Q. S2.A256). Everyone that accepts Islam must be motivated by a sincere desire to worship one god. He must also believe that Muhammad is the last Prophet sent by Allah to preach His final Word to all humanity.



Moreover, it is written in the book of Ali Ibn Abi Taleb to Al Oshter Al Nakhai, “Be away from blood and shedding it without legitimacy, because it will incur punishment and bring a terrible result. There is nothing more likely to bring a withdrawal of God’s blessing than shedding blood without right, and God, to whom be ascribed all perfection and majesty, begins at the crack of doom by judging mankind according to their shedding of blood”.<sup>75</sup>

The intention of *Jihad* is not victory by any means, but the intention is maintenance of Muslims’ and others’ freedom to practise and disseminate their religion without threat or hindrance.<sup>76</sup> In the many conquests of Islam, the Muslims called their opponents to choose among three options, entering Islam, signing a treaty or fighting. This is because it is considered that the endurance of the undying Islam is the first aim. The second option, signing a treaty, is a way to protect Muslims from others, and Tribute (*Al-Jazya*)<sup>77</sup> at that time was a tangible evidence of the preservation of contractual obligations. If the enemy refused to enter into an agreement with the Muslims, this was deemed as evidence that he intended to fight and lapse into perfidy and was waiting for a suitable chance to overrun the Muslims’ land. He was a cunning enemy, creating a case of continuing trouble and fear, so it was justified to resort to fighting against him.<sup>78</sup>

The first encounter between the Muslims and unbelievers (the Quraish tribe) was after a succession of violations by the Quraish on them. The remainder of the Prophet’s (pbuh) incursions, and his companions’ wars after him, occurred either because of a broken pledge, as when the Jews of Bani Qainaka in Madina and Quraish polytheists reneged on the Al Hudybia peace treaty (628 A.D); to prevent aggression, as in the case of the battles of Al-Khandaq (Trench) (627 A.D); or to carry on a preventive war, as was the case with the



Romans and Persians.<sup>79</sup>

Ibn Taymiya indicated that throughout the Prophet's life, if unbelievers concluded a truce with him, he would not fight them, and this is attested in the books on his line of conduct. If Allah had ordered the Prophet (pbuh) to fight and kill everyone who was an unbeliever, he would have begun the fighting.<sup>80</sup>

In conclusion, Islam regulates *Jihad* so that it is not to be resorted to except when it is necessary, such as to defend Muslims or to secure freedom of belief. Islam has spread and invaded the world, not by force, but by its ease and simplicity and supreme principles.<sup>81</sup>

### **1.3.2. The Causes of War (*Jihad*) in Islamic Law**

War is considered the most dreadful matter imaginable, since the substance of war is to kill human beings and a faithful man will not permit himself to destroy what Allah, to whom be ascribed all perfection and majesty, had built. Therefore the Holy *Quran* recognizes that war is a dreadful matter for Muslims. They do not like it for itself, but they accept it because Allah, to whom be ascribed all perfection and majesty, orders it and has imposed it for their benefit. Allah said: "Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But Allah knoweth, and ye know not."(H.Q.S2, A216). The messenger of Allah (pbuh) said: "Allah made fighting the torment of this nation in the world".<sup>82</sup> Therefore, *Jihad* is called a torment to the nation.

This dreadful matter is demanded by human mercy itself, to secure human well-being. If a tyrant were left oppressing poor people, this would not be mercy; the true mercy demands the overthrow of tyranny and oppression.<sup>83</sup> Since war in Islam is a dreadful matter, as it is stated, it is not possible for it to be a normal state; it is an exceptional state in Islamic Law. Therefore, some writers' assumption that war is legally a continuous, common state in Islam is not necessarily true.<sup>84</sup> The Prophet (pbuh) said "Oh people, do not wish to meet the enemy, and ask Allah for peace. If you meet them (enemy) you should be patient and know that paradise is under the shades of the swords".<sup>85</sup>

Watt argues that "During Muhammad's lifetime the war against opponents of Islam was a duty, though perhaps not a strict one, and it is largely defensive".<sup>86</sup> Furthermore, the majority of Islamic theologians assert that announcing war in Islam is the last remedy and it is not to be taken unless peaceful means are exhausted. They said that it is permissible and legal only when it is justified by definite necessity to achieve the desired condition. According to the majority of Muslim jurists, the motive for fighting in Islam is to repel aggression and to establish religious freedom for all, so they can look at Islam and understand the meaning of it.<sup>87</sup>

They argue that aggression during the time of the Prophet (pbuh) had two forms:

- 1) Aggression from the enemy against the Prophet (pbuh), where the Prophet thwarted their intrigue.
- 2) Aggression from non-Muslims towards Muslims, and reviling them for their faith, so that the Prophet (pbuh) had to stop that aggression, which was against the freedom of belief and thought.<sup>88</sup>

Furthermore, Muslims behaved in the same way after the Prophet (pbuh). They did not surprise any nations with war, but only fought after the enemy showed some signs of war and opposition to their mission; placed obstacles before it and insulted their beliefs. But they could not wait till the enemy attacked them in their lands due to the innate social rule. Ali Bin Abi Taleb says: “whenever a group of people is attacked in their own land, then they will be disgraced”.

Wahba Al Zuhaili defines the aggression that falls on Muslims and justifies fighting. He argues that: “Such aggression is a state of direct or indirect assault or violation on the Muslims or their possessions or their lands, which affects their independence, oppresses them, lures them away from their faith or threatens their safety and peace and attachment to the freedom of their mission, or the occurrence of evidence of bad faith relative to the Muslims, so they see that as an incontestable danger or demanding prudence and caution”.<sup>89</sup>

The definition of aggression indicates that Islam is not prone to kindling war and even detests it. Muslims fight only when driven to it by circumstances. This view is based on the following saying of Allah, to whom be ascribed all perfection and majesty: “Nor will they cease fighting you until they turn you back from your faith if they can” (H.Q.S2.A217). Therefore, the aim of Islam is the utmost superiority and not fighting except under necessity, as a mercy to all nations. Islam is for the general mercy of the world and mercy requires establishing justice among people. It does not permit surrendering to oppression or submitting to injustice. The Prophet (pbuh) says: “I am the Prophet of mercy” and the intended mercy is mercy for all people.<sup>90</sup> Therefore, Muslims must repel aggression that befalls them by announcing *Jihad*. Allah said: “Fight in the cause of Allah those who fight



you, but do not transgress limits; for Allah loveth not transgressors.”(H.Q.S2.A190). Also Allah said: “but fight them not at the Sacred Mosque, unless they (first) fight you there; but if they fight you, slay them. Such is the reward of those who suppress faith” (H.Q.S2.A191). And He said: “If then any one transgresses the prohibition against you, transgress ye likewise against him. But fear Allah, and know that Allah is with those who restrain themselves” (H.Q.S2.A194).

However, other scholars believed that *Jihad* is employed as an instrument for the complete application of the Islamic Law all over the planet. This view suggests that *Jihad* becomes an offensive endeavour in connection with efforts to convey the kind of world order that the *Quran* envisions. Proponents of this also found support for their opinion in the Holy *Quran*. Allah says: “And fight them on until there is no more persecution or oppression, and the religion becomes Allah's”. (H. Q. S2. A193). Also, Allah says: “And fight them on until there is no more persecution, and religion becomes Allah's in its entirety; but if they cease, verily Allah doth see all that they do” (H. Q. S8. A39). Moreover, the Prophet is reported to have said: “I am ordered to fight polytheists until they say there is no God but Allah”.<sup>91</sup> Thus, according to Mahmud Taha, “Some Muslim scholars believe that Islamic wars were purely defensive wars, a mistaken belief prompted by their keenness to refute claims by the Orientalists that Islam spread by means of the sword”.<sup>92</sup>

To sum up, we believe that *Jihad* is both defensive and offensive at the same time. It is defensive in the case where there is any aggression against the Islamic nation (*Dar Al-Islam*) or any part of it. Hence, Muslims have the right to wage *Jihad* in self-defence of the Islamic State or Islamic principles. On the other hand, since Islam is a universal message, it is a duty for every able Muslim to contribute to its dissemination. *Jihad* is offensive by

moving all obstacles that block free missionary activities. Every individual must be free to hear the mission of Islam and should be free to accept or reject it. If someone prevents anyone from accepting Islam, it is the duty of Muslims to fight him until he stops.<sup>93</sup> As Qutb indicated, “If we insist on calling *Jihad* a defensive movement, then we must change the meaning of the word ‘defence’ and mean by it ‘ the defence of men’ against all those elements which limit their freedom. These elements take the form of beliefs and concepts, as well as of political systems, based on economic, racial or class distinctions”.<sup>94</sup>

#### **1.4. Legality of War in International Law**

According to classic international law, a State was not prohibited from employing military force to pursue its objectives. Moreover, for many centuries, the legality of war was dominated in Western Europe by the concept of “just war”, which existed in the time of the Roman Empire, namely, the *bellum justum*.<sup>95</sup>

Early Christians accepted the concept of just war, even though it was not immediately embraced, because most Christians were pacifists. Because they believed that the return of Christ (pbuh) was imminent, believers should not engage themselves with worldly power. By the time of Augustine, the concept of just war had developed due to two factors: first, the growing realization that the return of Christ (pbuh) would take a long time, so Christians had to deal with the problem there and then. Second, the growing influence of Christianity in the Roman Empire and the increasing number of Christians who held power, led many to begin asking how Christian power could exist without the right to use force.<sup>96</sup>



In the medieval period, writers began to develop the *jus ad bellum*, and it is accepted that Grotius was the earliest modern writer to write on the law of war. Grotius, in his *De Jure Belli ac Pacis*, published in 1625, attempted to put a list of requirements for just war: it must be undertaken by a lawful authority; it must be undertaken by public declaration, and there must be a just cause, namely to defend person and property and to punish a State which had caused an injury. Also he discussed a list of unjust causes of war.<sup>97</sup>

It has been suggested that during the period between the eighteenth century and the outbreak of the First World War, going to war was regarded as an inherent and unlimited right of State sovereignty.<sup>98</sup> In 1880, William Edward Hall, a British jurist, argued that, “International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose”.<sup>99</sup> In other words, a State had an unlimited right to wage war at any time. The only requirement for war to be lawful, was a declaration of war. However, there might have been moral limitations on the resort to war.<sup>100</sup>

Under the League of Nations Covenant<sup>101</sup>, an attempt was made to prevent war. Article 11 of the Covenant made any war or threat of war a matter of concern to the whole League: “Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council”.

It is also declared to be the friendly right of each Member of the League to bring to the



attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

Article 12 of the Covenant obliged Members to submit any dispute (likely to lead to a rupture) to arbitration or judicial settlement or to enquiry by the [League] Council and not to resort to war until three months after the arbitrator's award or the report by the Council.

“The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute”.

Articles 13 and 15 obliged Members not to resort to war against any party of the dispute, which complied, with the recommendation of the report or an arbitral or court decision. However, Article 13 states that: “ The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement”.

Article 15, “If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the

Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof’.

Articles 11-15 preserved the right of States to resort to war. The only requirement was that they follow certain procedures for the pacific settlement of disputes and wait three months after an arbitral award attempting to regulate the dispute, as a “cooling-off period”. Thus, according to the Covenant, war was legal if the disputing parties followed the formal procedures.

Article 10 of the Covenant provides that Members of the League Covenant undertake to respect and preserve, as against external aggression, each other’s territorial integrity and existing political independence.<sup>102</sup>

According to some writers, the League of Nations Covenant had some defects. Firstly, in Article 13 of the Covenant, the expression “resort to war” had the general meaning of full-dress war, and no provisions were made to prohibit the so-called armed measures short of war. Furthermore, it might also be argued that the Covenant did not cover situations in which full-scale hostilities were taking place but technically there was no war, since the parties concerned did not recognize a state of war, which would mean that reprisals and war itself, in the absence of a formal declaration, could be lawful.<sup>103</sup> Secondly, Article 10, which prohibited any aggression, seemed to be in conflict with Article 15 (7), which permitted war in certain circumstances.<sup>104</sup> As De Lupis points out: “Not even aggression was completely forbidden by article 10 as that article was subordinate to some of the subsequent articles, in particular 15 (7) which allowed certain wars to enforce legal rights.



Therefore, an invasion could take place in the context of a “legal” war under article 15 and then not violate article 10”.<sup>105</sup>

The experience of states between 1920 and 1939 proves that war continued to exist and as the Second World War was taking place, the major powers became convinced that another international organization was needed. In 1945, the United Nations came into being, its preamble points out, to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”. With the establishment of the United Nations, the prohibition of States from resorting to war was invigorated after the catastrophic experience of the Second World War. Furthermore, Article 1.1 of the Charter provides that the purpose of the United Nations is “to maintain international peace and security, and to that end take collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression and other breaches of peace”.

To this end, Article 2(4) of the UN Charter provides that: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”. This Article establishes a general prohibition on the actual use of force or threat of use of force. It avoids the term “war”, referring instead to “the threat or use of force” which includes war. War has a technical meaning in international law and states usually engage in hostilities and deny that they are in a state of war. However, the term “use of force” covers all forcible measures short of war, such as peacetime reprisals.<sup>106</sup>

Unlike the League of Nations Covenant, the United Nations Charter provides a more complete, effective and, most importantly, collective security system. The Security Council



is endowed with extensive powers. Chapter VII of the Charter provides that, if there should be any threat to peace or act of aggression, the Security Council is given the power to make recommendations or decide what measures shall be taken; call for “provisional measures”; under Article 40; apply non-military enforcement measures under article 40 and take military action in accordance with Article 42, as it deems necessary to maintain or restore peace and security.<sup>107</sup>

However, there are exceptions to the prohibition of use or threat of force. These are contained in Article 51, which preserve the inherent right of self-defence, by individuals or collectives. Article 51 declares that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

Also, collective military action is to be authorized by the Security Council under article 42: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”.

In Article 53, the enforcement action of regional arrangements or agencies comes under the authority of the Security Council:

“The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state”.

Finally, Article 107 deals with the approval of Member States for use of force against former enemy states. It warns that,<sup>108</sup> “Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action”.

### **1.5. The Rules Regulating War in Islamic Law:**

As we have previously said, war is an exception in Islam and the rule in relations with non-Muslims is peace<sup>109</sup> not war. No one can resort to war unless he is compelled to, and war cannot be waged other than for the sake of defending Islam, ending oppression and protecting the religion. Therefore, Islam does not permit its fighters to engage in a storm of anger without reasoning or prudence.



Islam was the first to lay down rules of war and put forth principles that control and arrange the behaviour of fighters during combat, in detailed terms that are not invalidated by the standard of modern technology.<sup>110</sup> So, what are the rules followed in Islamic wars? In the following pages we will look briefly at the law of war in Islamic Law:

### **1.5.1. Calling before fighting.**

Islamic Jurists agree that Muslims must call others (non Muslims) to accept Islam or to pay tribute (*Al-Jazya*), before starting fighting.<sup>111</sup> In the *Sunna*, Buredah recounts from his father that the Prophet of Allah (pbuh) said, when he sent a leader, a prince or a company, he recommended him strongly to fear God in himself and the Muslims with him. The Prophet (pbuh) said: “If you meet your enemy, you have to call them to three alternatives. If they answer you, accept it from them and refrain from fighting them. Call them to Islam and if they answer you, you have to accept it from them and refrain from fighting them and if they refuse you, call them to pay the (*Al-jazya*) tribute. If they answer, you have to accept it from them and refrain from fighting them. If they refuse, you can seek the help of Allah and fight them”.<sup>112</sup>

Thus, the offering of a call to disbelievers is a settled matter in Islamic Law. God, to whom be ascribed all perfection and majesty, says: “No bearer of burdens can bear the burden of another: nor would We punish until We had sent a messenger (to give warning)”. (H. Q. S17. A15). Furthermore, Abn Abbas says “The messenger of Allah (pbuh) continued never to fight a nation until he had called them”.<sup>113</sup> In addition, Ibn Rushd said, “A prerequisite of war is to inform the enemy, about Islam. I mean you cannot fight them unless they have



been informed about the mission, and that is agreed among Muslims”<sup>114</sup>. This is also confirmed by Lewis who states that it is “required by law to give the other side due notice before resuming hostilities”<sup>115</sup>. This notification is similar to what is known in the early modern age as the Ultimatum.<sup>116</sup>

This is in the case of people who have not heard about Islam. However, for those who have been informed about Islam, the matter is different. Jurisprudents have different views over repeating the call to them. Some say that the repeating of the call is not a must but some agree to repeat it<sup>117</sup>, and it is preferable that it should be repeated and the call to Allah be renewed at every battle, if there is no imminent danger of an attack on the Muslims. That is because most people know little or nothing about Islam, but when they know the call to Allah, perhaps they will turn to Islam and there will be no need for war after that. Allah said: “And there are among them illiterates, who know not the Book, but (see therein their own) desires, and they do nothing but conjecture”. (H. Q. S2. A78).<sup>118</sup>

As a practical instance of this principle, that is, warning those who have not been informed of the call to Allah, the people of Samar-Kand in Asia complained to Omar Ibn Abdul-Aziz that the leader Kutaiba Bin Muslim Al Bahily had entered their city and occupied it with Muslims on a treacherous basis, and Omar Bin Abdul Aziz wrote to his ruler or governor ordering him to designate a judge for them as they mentioned, and if he decided to oust the Muslims, they must be ousted. He designated Gouma Bin Hader Al-Bagi who ruled that the Muslims must be ousted.<sup>119</sup>

On the opinion of Al-Shafei, if Muslims fight without first issuing a call to Islam, and not informing the enemy of that call or invitation, someone in charge must pay blood money

for those among them who are killed, whether they are polytheists or Christians and Jews, “the people of a Book”.<sup>120</sup>

### **1.5.2. The prohibition against the mutilation of the dead:**

Islam has instituted a decisive prohibition against the violation of the remains of enemy people, e.g. cutting off their lips or other parts and so on. The Prophet (pbuh) says to the leaders of the army and companies: “invade in the name of Allah for the sake of Allah, kill the disbeliever of Allah, invade but do not do falsity and do not mutilate”.<sup>121</sup> Furthermore, Abu Zahra argues that: “it is supposed that such treatment is regarded as an essential principle in international relations by both Muslims and others, in peace and war, but abiding by that principle depends on Virtue. If that principle were opposed to virtue we would find it is neglected, but virtue follows the fortitude principle, which does not accept barbarity on any account”.<sup>122</sup>

The Quraish mutilated the remains of Hamza Bin Abd Al Mottaleb (the uncle of the Prophet (pbuh) in an incursion of Uhud (625 A.D) and the Prophet (pbuh) wanted to avenge his uncle. He swore to God that if he lived, he would mutilate seventy of their dead. God, to whom be ascribed all perfection and majesty, revealed: “And if ye punish, let your punishment be proportional to the wrong that has been done to you: but if ye show patience, that is indeed the best (course) for those who are patient” (H. Q. S16.A126). Then the Prophet (pbuh) said, “We must be patient”. He refrained from his intention and retracted the oath of vengeance he had sworn.<sup>123</sup>

### **1.5.3. The prohibition against killing civilians:**

Islamic Law declares that those who have not participated or have no hand in the war, e.g. women, the young and old people, must not be killed and Islam considers that killing them is a kind of oppression and aggression.<sup>124</sup> This is considered one of the principles of fighting in Islamic wars, that no one can be killed other than those who fight and carry a weapon and show aggression towards the Muslim. Allah said: “Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors” (H. Q. S2.A190). In this verse Allah sanctioned fighting those who fight but prohibited aggression and intended that those who do not participate in the fighting, women, young boys and others, must not be killed. The Prophet (pbuh) also said, “Do not kill a woman or baby”.<sup>125</sup>

The Imam al-Nawawi said that all the Scholars of Islam agree to accept that Hadith (tradition) and the proscription of killing women, children and others unless they are fighting.<sup>126</sup> It is recounted, for instance, that a woman was found killed in some of the Prophet’s (pbuh) incursions, whereupon the Prophet condemned killing women and boys.<sup>127</sup>

Islam also prohibited the killing of religious men if they did not fight or participate in fighting. However, if they participate in the fighting, albeit with their opinions or by inciting it, they can be killed.<sup>128</sup> Allah said: “Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors” (H. Q. S2. A190). Those who do not fight must not be killed. It was also mentioned that the Prophet (pbuh) and his followers prohibited the killing of old men.



To sum up, we can see that Islam has distinguished between fighters and non-fighters. Fighters are the company who actually participate in the fighting, because they have the mental and physical capacity to help in fighting. But non-fighters, who have not the ability to fight or participate in wars, physically or mentally, and do not generally share in war, such as women, children, old men, sick people, those who have a deformity, ascetics in their hermitages and those who worship in their tabernacles with their different religions and others, none of them caused any prejudice or injury. Therefore, Islam has permitted fighting the first category and prohibited fighting the second.<sup>129</sup>

#### **1.5.4. The prohibition against falsity (treachery) and breach of faith:**

Islam despises falsity (treachery) and rejects it and orders Muslims to keep loyalty and good faith always, whether in peacetime or wartime. Allah said: “Fulfil the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made Allah your surety; for Allah knoweth all that ye do” (Q. H. S16. A91). And as the loyalty of faith is considered one of the characteristics of the true faithful people. Allah referred to: “Those who faithfully observe their trusts and their covenants” (H. Q. S23. A8). Further, the Prophet (pbuh) said: “When Allah gathers the first and the last people on the Day of Judgement, He will give to every person who has broken faith a flag showing their falsehood”.<sup>130</sup>

Falsity is different from deception in war. Deceiving in war is acceptable provided it does not entail breach of faith. On the subject of allowing the case of strategy in war, the Prophet (pbuh) said, “War is a ploy”.<sup>131</sup> Islam has permitted deception in war; at the same time Islam denies the use of these means if they lead to falsity or breach of faith, because this

characteristic is considered as hypocrisy, and it is considered disgraceful behaviour, which Muslims cannot accept. The Prophet (pbuh) said, “There are four things, if one did all of them he was a true hypocrite and if he possessed one of these characteristics he was one part a hypocrite until he stopped it: if he was entrusted with something and proved unfaithful; if he spoke, and became a liar; if he broke a covenant; and if he committed perjury”.<sup>132</sup>

It is evident, therefore, that fighting techniques based on treachery and perfidy are prohibited in Islam.<sup>133</sup>

#### **1.5.5. The prohibition against vandalism:**

Among the principles that control the combatants' behaviour during fighting is an embargo on destroying enemy buildings and possessions, except for reason of military necessity. Evidence of that is the testimony of Abu Bakr to Yazeed Bin Sofian when he sent him as a leader of the army to *Al-Sham* (Syria, Lebanon and Palestine at present). He said to him as he sent him off, “I give you commands. Do not kill a woman, a boy or an old man; do not cut plentiful trees, do not ruin buildings; do not slaughter a sheep or a camel except on behalf of its owner, do not burn a palm tree or drown it, do not be coward”.<sup>134</sup>

Al-Awzaie said, “it is not permitted for the Muslims to do something that may lead to ruin in *Dar Al Harb* (non Muslim State), because that is a waste and Allah, to whom be ascribed all perfection and majesty, does not like waste”.<sup>135</sup> But if the enemy has to hold or reside in or hide behind trees or in a house to ambush Muslims, then it is allowed to destroy the

houses and cut the trees so that the Muslims can fight and face the enemy, and this is a matter of military necessity. This happens during battle, but in any other circumstances it is absolutely forbidden in the text of the *Quran*. Allah said, “When he turns his back, His aim everywhere is to spread mischief through the earth and destroy crops and progeny. But Allah loveth not mischief” (H. Q. S2.A205). Therefore it has become clear that building on the earth is commendable, but seeking ruin is condemned.

Those are the instructions and morals of Islam in war and there are others, but we confine ourselves to these as a summary. All of them aim at preserving human dignity in consideration of the humanity granted by God.<sup>136</sup> Allah, to whom be ascribed all perfection and majesty, said, “We have honored the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors, above a great part of Our Creation” (H. Q. S17. A70). These are the instructions that the Islamic teaching has set up for fourteen centuries. They are considered the first standardisation of the rules of war and Muslims have respected them and abided by them in subsequent ages, an example is the conduct of Salah Aldin in his wars with the Crusaders of Christendom.

### **1.6. The Division of the World into Three Parts During Wars:**

In contemporary international law, the state of war between two States or more results in a division of the international family into two parts: the belligerent group which includes States which take part in the fighting, and the non-belligerent group which are characterised



as neutral, which includes the rest of the world. However, what is the Islamic concept toward this division?

According to some Islamic jurists, as a result of war the world is split into two or three (*Dar*) parts, and before we look at their opinions it is useful to understand the meaning of *Dar* in its literal and technical senses. *Dar* literally means a house or a place inhabited by a people (nation) or a tribe. In other words it is a country, i.e. any piece of land possessed and inhabited, or a limited territory or specified place such *Baghdad* or *Kufa*.<sup>137</sup>

Technically, *Dar* is defined as a place (location), country, home, territory or the area that is occupied by a group of people who live under the leadership of a state authority.<sup>138</sup> *Dar* in the contemporary convention, however, is a country, constituted by a group of people settling (usually) in a certain territory, having rules and a legal system, a moral personality and political independence.<sup>139</sup> This, the meaning of *Al-Dar* or a country to contemporary lawyers, is not different from the definition of *Al-Dar* given by Muslim Jurists.

### **1.6.1. Dar Al-Islam and Dar Al-Harb**

Muslim scholars have defined *Dar Al-Islam* (the Islamic State) according to various formulae and criteria that can be summarized in one definition, that is: It is *the Dar* (state) where the rules of Islam prevail, it is controlled by a Muslim ruler (governor), and power is in the hands of Muslims. In contrast, *Dar Al-Harb* is a state where infidel rules prevail and there is no authority or will in Muslim hands.<sup>140</sup> Here, we will give some specific

definitions:

Al Imam Ibn al-Qayyim said, “*Dar Al-Islam* is a State that Muslims have settled in and where Islamic rules are applied, while any place without the rules of Islam applying is not *Dar Al-Islam*, and anywhere that is not *Dar Al-Islam* is *Dar Al-Harb*”.<sup>141</sup>

Al-Imam Abo Yusef said, “A State is considered *Dar Al-Islam* once Islamic rules appear in it, even if the majority of its people are non-Muslims. And a State is considered *Dar Al-Harb* with the appearance of the rules of non-Muslims, even though most of its people (inhabitants) are Muslims”.<sup>142</sup>

Abdul Al-Qaher Al-Baghdadi said, “Every State in which the call to Islam has appeared among its inhabitants without a protector and they do not pay tribute, and where Muslim rules apply to Muslims and non-Muslims, and none of the Muslim inhabitants is aggrieved, is considered *Dar Islam*. And if the case is other than what we have described, then it is considered *Dar Al-Kufr (Dar Al-Harb)*”.<sup>143</sup>

Thus, the result does not depend on the kind of inhabitants, or their number, but on the quality of the ruler and the constitution of the rule in it the territory concerned. Thus, some of these definitions consider *Dar Al-Islam* as a place where the rule and the power lie with Muslims and some others consider *Dar Al-Islam* to be a place where Islamic legislation is applied. In fact, we could argue that these definitions agree in meaning, in the sense that it becomes difficult to apply Islamic rules, unless Muslims have the authority to protect their place from assault on its inhabitants, or from destruction. And if the power and rule are in the hands of non-Muslims, Islamic rules cannot be applied unless the authority permits it. Therefore, if a country is ruled by non-Muslims, even if some Muslims rites appear in it, we can say that such a country is not called *Dar Al-Islam*. So, the definitions that recognize *Dar Al-Islam* by the manifestation of the Islamic rules in it, and others that do so based on



power and authority, all agree in meaning, because it is impossible to exhibit Islamic rules if there is no Islamic authority to apply and protect such rules.

As for the definitions that look at *Dar Al-Islam* in term of Islamic authority, we can find that they agree with the other definitions since, if power and force are held by the Muslims, then it is possible to establish the Islamic rules and carry them out, and when the authority and rules in the *Dar* rest with non-Muslims, then it is considered *Dar Al-Harb* because it is impossible to apply Islamic Law. Abo Zahar, for example, states that “*Dar Al-Islam* is a *Dar* which is controlled by Muslims, the rules of Islam are applied and the power and strength belong to Muslims. Muslims must defend and protect this *Dar* and the defence against any attack in it is a collective duty”.<sup>144</sup>

Dr Zaou Moftah says that “The appearance of what is called *Dar Al-Harb* is a result of the Muslim’s situation at the time of the Islamic Calling (Mission) and afterwards, in a hostile state that aimed to sabotage the mission and destroy the inhabitants. And if the Muslims did not secure themselves and their faith when the enemy ambushed them, then the *Dar* is *Dar Harb*, and this is due to the fact that Muslims believe that the Islamic mission came to the whole world (people) and those who embrace it, must inform the whole world about it, as far as possible”.<sup>145</sup>

Allah says: “And this is a Book which We have sent down, bringing blessings, and confirming (the revelations) which came before it: that thou mayest warn the Mother of Cities (Makkah) and all around her. Those who believe in the Hereafter believe in this (Book), and they are constant in guarding their prayers” (H. Q. S6 .A92). He also says: “Those who strive against Our Signs, to frustrate them, will be given over into



chastisement”. (H. Q. S34. A38).

So, Dr Zaou holds another criterion for dividing the world, where a state, which is outside Islamic sovereign authority, is called *Dar Al-Dawaa* (mission) and that is because Muslims have to educate people and spread Islam, and a non-Islamic State does not become *Dar Al-Harb* unless the non- Muslims fight the Muslims.

The division of the world into two sections, namely, *Dar al-Islam* and *Dar al-Harb*, does not mean that they are in a continuous state of hostility and quarrel, but the meaning here relates to the establishment of security and peace, which is the nearest to the Islamic meaning and agrees with the origin of the idea of Islamic wars.<sup>146</sup>

#### **1.6.2. How Dar Islam becomes Dar Harb and the opposite:**

*Dar Al-Harb* transforms into *Dar Islam* simply with the application of Islamic rules in it, even though there may be no Muslims living in it; it suffices that it is in the control of the head of the Islamic State and Islam. This is the opinion of the majority of Muslim jurists. Therefore, if non-Muslims take a State (*Dar*) from the Islamic authority or any part of the Muslim’s country or if the inhabitants of a country apostatise, and carry out infidel rules or breach a treaty, then it becomes *Dar Harb*. On the other hand, Abo Hanifah stated that *Dar Al-Islam* does not change into *Dar Al-Harb* unless there are three conditions:

- 1) The appearance (application) of the rules of infidels (non-Muslims).
- 2) The bordering of this *Dar* to *Dar Al-Harb*.
- 3) Lack of security for Muslims and people under Muslims protection (the Dhimmah).<sup>147</sup>

### 1.6.3. Dar Al-Ahd (Solh)

As a result of the establishment of the practice of forming treaties with enemies, which is considered to be originated in Islamic Law, Al-Shafi divided the world into three parts (*Dars*) as follows:

*Dar Al-Islam*, *Dar Al-Harb* and *Dar Al-Ahd* (territory of treaty) or *Dar Al-Solh* (territory of peaceful arrangement). We have already looked at *Dar Al-Islam* and *Dar Al-Harb*, but what does *Dar Al-Ahd* mean?

*Dar Al-Ahd* is a country that has signed a peace treaty with an Islamic country (*Dar al-Islam*) -with or without fighting- on conditions agreed upon between the two parties. These conditions may differ in severity as long as the two parties agree. However, peace between Muslims and non-Muslims in most cases relies on a levy from farmland, called land tax (*Kharraj*)<sup>148</sup>, without taking tribute (*Jazah*), because they are not among *the Dar Al-Islam*.<sup>149</sup>

These countries have not come under the power of Islam, so Muslims cannot apply Islamic Law in them, but their inhabitants have entered into a contract with the Muslims on certain conditions, so these countries keep their own legislation and rules and become similar to countries that enjoy outright independence as a result of the existence of the treaty.<sup>150</sup>

The source of this idea can be found in cases like Nasara Najran, Al-Noubah territory and Armenia.<sup>151</sup> The Prophet (pbuh) made a treaty with the Christians of Nahran (Nasara Najran) according to which they secured themselves and their money from any aggression

that they may be exposed to, whether from Muslims or from others and, in exchange he levied a tax on them. In the time of Othman (the third Caliph 644-656 A.D), Abdul Allah Ibn Abi Serh contracted a peace treaty with Al-Noubh's inhabitants without imposing a tribute<sup>152</sup>; but arrangement was made for commercial exchange between the two parties.<sup>153</sup> Also, Moawia Ibn Abi Sofian made a treaty with the inhabitants of Armenia, in which was agreed their absolute interior supremacy.<sup>154</sup> These countries cannot be considered *Dar Islam* or *Dar Harb*, but they are considered as peaceful countries (*Dar Mowdah* or *Dar Ahd*).<sup>155</sup>

This opinion is held by some Hanbali Scholars and Shaibani from the Hanafi school who decided that *Dar Al-Ahd* differs from *Dar Al-Islam* and *Dar Al-Harb*.<sup>156</sup> However, the majority of jurists did not recognize this division, saying that *Dar Al-Ahd* is part of *Dar Al-Islam* in general, because, as a result of their agreement, they become as non-Muslims who live with Muslims in the land of Muslims (the Dhimmah).<sup>157</sup> Our opinion is that if such a country submitted to the rules of Islam, as was the case with Nasara Najran, then it is considered as one of the countries of Islam (*Dar Islam*) because the power and the authority lie with the Muslims. On the other hand, if a country does not carry out the Muslims' laws, then it is a territory of peaceful arrangement or territory of treaty (*Dar Mowadah* or *Dar Ahd*) even if it pays money to the Muslims, because of the non-application of the laws of Islam.<sup>158</sup>

It is interesting to observe that the world now is gathering under one organization and all members keep its rules and systems. The Islamic attitude towards this is that Muslims must abide by covenants and adhere loyally to their commitments, as decided by the Holy *Quran*. According to that, the dissentient *Dar* (territories), which belong to this institution, do not become *Dar Harb* in principle, but are considered *Dar Ahd*.<sup>159</sup> Therefore, the view



held by Al-Shafi, some of the Hanbali School and Al-Shaibani among the Hanafi scholars, is essential to the present international relations between Muslims and others in order to secure political, economic and other advantages.

Today, peace not war is considered the basis of relations with other countries and the fact that cannot be ignored is that the appearance of the idea of *Dar Al-Ahd* is subject to the development of the Islamic countries' relations with others. When wars existed between Muslims and others, the idea of dividing the world into two *Dars* appeared, and when relations settled and war was less common, need appeared to consolidate the natural relations between Muslims and others by way of conventions in the interest of peace, which is considered the essence of international relations in the light of Islam.<sup>160</sup> *Dar Al-Islam* includes all Islamic countries, however distant from others, so long as these countries tend into one direction and are run under one policy and are governed by one law, that is, Islamic legislation, even if the countries become numerous. The citizens of that *Dar* may include not only Muslims and but also non-Muslims who are settled in a permanent settlement and are known as the Dhimmah, non-Muslims under the rule and the protection of Muslims. Those "secure people" are citizens who entered *the Dar Al-Islam* for temporary safety, for a period less than a year.<sup>161</sup> On that basis, Muslims and non-Muslims under Islamic rules, as citizens of *Dar Al-Islam*, enjoy what has recently been called "Islamic nationality", which joins them with the Islamic Nation.<sup>162</sup> *Dar Al-Harb* consists of all countries that do not have Islamic authority and where no Islamic rules are prevailing whatever the legal or political system. The citizens of that *Dar* are called millenarians (*Harbeen*). It is not necessary that they are always enemies; they may form a bond with Muslims and then they can be called allies (*Muahadeen*) and they are not required in the bond to pay money to Muslims, as it has been discussed above.<sup>163</sup>

## 1.7. The Nature of Relations between Muslim and non-Muslim states

Islamic scholars agree that the Islamic Nation should be based on religious unity. All its members form the Islamic Nation, regardless of their race, ethnic origin, language, or government. This Nation is governed by one leader, lives in peace and equality and is called *Dar Al-Islam*, as discussed in the previous section. Nevertheless, they disagree on the relationship that between *Dar Al-Islam* (Islamic State) and other States (*Dar Al-Harb*). This disagreement is due to jurists' understanding of the cause of war in Islam; is it disbelief or not?

One approach (that of the early jurists) claims that the relationship between Muslims and non-Muslims is characterised by war<sup>164</sup> and the cause of that is disbelief. Its scholars believe that Islam requires its opponents to be converted. Conversion can occur in two ways: by reasoning and speech, or by the sword (the use of force).<sup>165</sup> Those who are not converted to Islam by reasoning or speech should be converted by force and wars.<sup>166</sup> Those scholars base their views on the *Quran*. Allah says: "And fight the Pagans all together as they fight you all together". (H.Q.S9.A36). And He said: "Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But Allah knoweth, and ye know not." (H.Q.S2.A216).

They argue that these *Quranic* verses order Muslims to wage war against non-believers even if they do not attack, since the verses contain no condition that war must only be a reprisal or counter attack. Moreover, they argue that God forbade having non-Muslim allies. Allah says: "O ye who believe! Take not my enemies and yours as friends (or protectors), - offering them (your) love, even though they have rejected the Truth that has



come to you”. (H. Q. S60. A1).

Other scholars (modern jurists) consider that the relationship that links Muslims to other nations has to be based on peace, not war<sup>167</sup>, and that war is an exceptional case which is legitimate in only two cases:

- 1) In self-defence and in defence of the Mission of Islam.
- 2) To help an Islamic nation (group), and its unarmed allies who are unable to defend themselves.<sup>168</sup>

They base their views on the following evidence:

- 1) The verses dealing with war are clarified in the light of the reasons of war, and war is only legal on condition of the existence of these reasons. Allah says: “Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors”. (H.Q.S2.A190). Also Allah said: “And fight them on until there is no more persecution, and religion becomes Allah's in its entirety; but if they cease, verily Allah doth see all that they do” (H.Q.S8.A39)

- 2) Forcing people into Islam is not a legitimate way of conversion. Belief in Islam has to be based on personal will and conviction. This goal cannot be achieved by force but only by evidence and persuasion. Allah Says: “If it had been thy Lord's Will, they would all have believed,- all who are on earth! Wilt thou then compel mankind, against their will, to believe!” (H. Q. S10. A99)

In examining the proofs used by the first school of thought, we find that the verses which they cite are general. Even though they order Muslims to wage war, the conditions set out in other verses map out the reasons for war.



Also, regarding the argument that God forbade having non-Muslim allies, we say that this prohibition is limited to not helping them or sustaining them against other Muslims. In this respect, Ibn Jarir states in his explanation of the verse “sustaining them against Muslims and showing them their defects is forbidden, but having them as allies in the sense of friends is legitimate”.<sup>169</sup> God said: “It may be that Allah will establish friendship between you and those whom ye (now) hold as enemies. For Allah has power (over all things); and Allah is Oft-Forgiving, Most Merciful. Allah forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just” (H. Q. S60. A7-8)

Moreover, the majority of Muslims scholars agree that killing women, children, monks, the elderly, and the blind is forbidden even though they are unbelievers, because they do not participate in the fighting. If war were waged purely to force people into Islam, there would be no reason to exempt these people from killing. The fact that they are exempted is evidence that war is a response to an act of aggression. Accordingly, it is not required to fight non-believers unless they start an act of aggression. Allah said, “And slay them wherever ye catch them, and turn them out from where they have turned you out; for persecution and oppression are worse than slaughter; but fight them not at the Sacred Mosque, unless they (first) fight you there; but if they fight you, slay them. Such is the reward of those who suppress faith” [H. Q. S2.A191). Accordingly, fighting, for Muslims, is only a response to an aggression and it is forbidden to start it.<sup>170</sup>

Mohammed Chaltout has summarised his study of the legitimacy of war in Islam in the

following points:

- 1) There is no verse in the *Quran* that suggests or hints that war in Islam is an obligation in order to force people into it.
- 2) War is justified as an act of self-defence to respond against an attack, to protect Islam, and to secure the freedom of thought.<sup>171</sup>

As Ali Mansour states, war in Islam is not the relationship that links Muslims to other nations. This is found in many *Quranic* verses, as well as the Prophet's saying and deeds. Peace is the relation that links us to the other nations.<sup>172</sup> Allah said: "O ye who believe! Enter into Islam whole-heartedly; and follow not the footsteps of Satan; for he is to you an avowed enemy". (H. Q. S2. A208). Above all, establishing peace and peace is a duty for Muslims, and that includes international peace and security. Allah says: "But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah: for He is the One that heareth and knoweth (all things)." (H. Q. S8.A60). The *Quranic* verse states that if the enemy attacks you, you respond to the attack, but if your enemy tends towards peace, you should respect it.

In this respect, it is clear that the relationship that links Muslims to others is peace, not war. War is imposed on Muslims and they have to wage it in self-defence of the Islamic nation or its Mission only. This is consistent with the principles of international law.

## **Conclusion**

The purpose of this chapter was to establish the cultural and theoretical context for the present study. The early part of the chapter was concerned to establish the sources of

Islamic Law. It was seen that Islamic Law is drawn predominantly from the Holy *Quran* and the *Sunna*. Only if there is no clear ruling in these sources, is it permissible to resort to consensus or analogy in deriving rules of conduct. It is important to understand the relationship between these sources in order to understand the reasoning given by Islamic scholars for the principles and rules they have derived, and the differences of opinion which sometimes arise between scholars of different schools of Islamic jurisprudence.

The second main issue addressed was the concept of war in Islam, and its differences and similarities with the concept applied in international law. It has been seen that the Islamic concept of Jihad is unlike the general international concept of war, in having an explicit spiritual dimension; it is concerned specifically to secure freedom from injustice and oppression which might prevent the practice of Islam. The Islamic and international law concepts of war have in common an attempt to define situations where war is permissible and to render war unlawful outside these boundaries; thus, in both systems, the normal relations between States should be peaceful. Both systems also place constraints on the way war is conducted, such as the rules to protect non-participants.

This background places us in a better position to understand the approach taken in each legal system, towards the legal status of prisoners of war, which is our main concern in this thesis. We begin discussion of this issue in Chapter Two, by analysing the definitions of prisoners of war in Islamic and international law.



## Endnotes to Chapter One

<sup>1</sup> Ramadan, Said, The Islamic Law, Its Scope and Equity, London, Geneva, Second Edition, 1970 A.D, p41.

<sup>2</sup> Al-Ghazali, Abe Hamed Muhammad, al-Mustasfa min Alam al-Asoul, vol. I, Cairo, al-Matbah al-Ameereh, p86.

<sup>3</sup> Denffer, Ahmad Von, Ulm al-Quran, London, The Islamic Foundation, 1989 A. D, p17.

<sup>4</sup> Azizullah, Muhammad, Glimpses of the Hadith, Karachi, Crescent Publications, First Edition, 1965, p11.

<sup>5</sup> Ramadan, Said, op cit, p43.

<sup>6</sup> Abu Zahra, Asuol al-Faqah, Cairo, no publisher, no date, p81.

<sup>7</sup> Al-Shafai, Ahmad Muhammed, Asuol al-Faqh al-Islami, Alexandria, Dar al-Hudi, 1998 A.D, p37. See also, Ibraheem, Abdullrahman Ibraheem, Alam Asoul al-Faqh al-Islami, Aman, Maktabat al-Thaqafh wal-Nasher, 1999 A.D, p17 and 22. See also, Ramadan, Said, op cit, p43. See also, Seraj, Muhammad, Asoul al-Faqh al-Islami, Alexandria, Manshat al-Mearf, 1998 A.D, p44. According to Muslims the Quran is full of miracles such as: 1) The eloquence and fluency of the Holy *Quran*: This eloquence and fluency, which is shown in the match between the wording and the meaning, is unique, in a good style that the Arabs did not know before. The *Quran* is not poetry, prose or rhyme, but it combines the beauties of all of them. Eloquent Arabs have felt this, whether Arabs who embraced Islam because of its beauty, or those who testified that it is not the speech of humans, but still continue their misbelieve.

2) The *Quran* tells of events that will happen in the future: It foretold events that would happen in the future, that no one knew about, and these things actually happened. For example, Allah said: "The Romans have been defeated. In a land close by; but they, (even) after (this) defeat of theirs, will soon be victorious. Within a few years" (H. Q. S30. A2-3 and 4). And also Allah said: "Truly did Allah fulfill the vision for His Messenger. ye shall enter the Sacred Mosque, if Allah wills, with minds secure". (H. Q. S48. A27).

3) The *Quran* tells of people of the past: It tells stories about ancient peoples such as the peoples of Noah, Ibrahim and Lot, and about Moses, the Pharaohs and about Jesus and other Messengers of Allah (Upon them the prayers and peace of God). And this is an indication that the Holy *Quran* was inspired by Allah, since no-one in Makkah at that time would have known these ancient stories unless they had been revealed to the Prophet. Allah said: "Such are some of the stories of the Unseen, which We have revealed unto thee: before this, neither thou nor thy People knew them. So persevere patiently: for the End is for those who are righteous". (H. Q. S11.A49).

4- The Holy *Quran* contains some scientific facts that the Arabs did not know and which have subsequently been proved by modern science. For example, Allah said: "Then We made the sperm into a clot of congealed blood; then of that clot We made a (fetus) lump; then we made out of that lump bones and clothed the bones with flesh; then We developed out of it another creature. So blessed be Allah, the best to create. After that, at length ye will die. Again, on the Day of Judgment, will ye be raised up" (H. Q. S23.A14, 15 and 16).

The *Quran* mentioned the stages of development of the foetus and that is a miracle and an indication that the Holy *Quran* is from Allah, to whom be ascribed all perfection and majesty, since no one had taught the Prophet Mohammed (pbuh) and he was illiterate. He did not study medicine, nor was there any university or any scientists in his homeland. These stages, through which the foetus develops in its mother's womb, were revealed through the inspiration of Allah, who knows everything.

<sup>8</sup> Al-Bukhari, Muhammad ibn Ismail, Sahih al-Bukhari, Cairo, Dar Ihay al-Kutub al-Arabih, H. No. 4639. See also, Abu Dawood, Sulyman, Sunan abu Dawood, Cairo, Matbat al-Saada, 1369 A.H/ 1950 A.D, H. No. 1240.

<sup>9</sup> The *Redda* Wars were wars waged against some Arabic tribes that defected from Islam by refusing to pay the Zakkah after the death of the Prophet (pbuh).



<sup>10</sup> The Hegra date is the Islamic calendar. It started in the lunar year in which prophet Muhammad (pbuh) immigrated from Makkah to Madinah.

<sup>11</sup> Ramadan, Said, op cit, p41.

<sup>12</sup> Watt, William Montgomery, Islam a Short History, Oxford, Oneworld, 1999 A.D, p48. See also, Elbakry, Mohamed Mokbel Mohmud, The Legality of "War" In Al-Shari'a Al-Islamiya (Islamic Law) and Contemporary International Law, PhD, University of Glasgow, 1988 A. D. p165.

<sup>13</sup> Al-Shafai, Ahmad Muhammad, op cit, p50.

<sup>14</sup> Zakkah: the amount payable by a Muslim on his net worth as a part of his religious obligation, mainly for the benefit of the poor and the needy

<sup>15</sup> Hajj: pilgrimage to the Holy sites of Makkah; every Muslim who is able to do so have to make such a pilgrimage once in his/her lifetime.

<sup>16</sup> Seraj, Muhammad, op cit, p123. See also, Al-Shafai, Ahmad Muhammad, op cit, p57.

<sup>17</sup> Muslim, Ibn al-Hajjaj bin Muslim, Sharh Sahih Muslim, Beirut, Dar al-Qalam, 1987 A.D, H. No. 1691.

<sup>18</sup> Al-Iamadi, Saf al-Dean Ibn al-Hasan Ali ibn Ahmad, Al-Ahkam fa Asoul al-Ahkam, Tabat Sbeah, 1400 A.H, 1980 A.D, vol. I, p56. See also, Elbakry, op cit, P171. See also, Ramadan, Said, op cit, p44.

<sup>19</sup> Al-Qattan, Manna Khalil, al-Tashri wal-Fiqh fil- Islam, Beirut, Muassasat al-Risala, 1987 A.D, p88. See also, Shaltot, Mahmud, al-Islam Aqeda wa Shariea, Cairo, Dar al-Shuruq, 1992 A.D, p 492.

<sup>20</sup> Ibraheem, Abdullrahman Ibraheem, op cit, p40, See also, Imam, Muhmmad Kamal, Asoul al-Fagh, Alexandria, Dar al-Matbuat al-Jamaeh, no date, p155.

<sup>21</sup> Ramadan, Said, op cit, p44.

<sup>22</sup> Azizullah, Muhammad, op cit, p21. See also, Elbakry, op cit, p175.

<sup>23</sup> Abu Dawood, op cit, H. No. 2507. See also, Al-Tarmathi, Muhammad Ibn Esa, Sunan al-Tarmathi, Cairo, Mustafa al-Halabi, no date, H. No. 2027.

<sup>24</sup> Muslim, op cit, H. No. 4006.

<sup>25</sup> Watt, op cit, p 89. See also, Azizullah, Muhammad, op cit, p23.

<sup>26</sup> Azizullah, Muhammad, op cit, p21.

<sup>27</sup> Seraj, Muhammad, op cit, p142. See also, Imam, Muhmmad Kamal, op cit, p154. For more details see, Ramadan, Said, op cit, pp 44 - 51.

<sup>28</sup> Azizullah, Muhammad, op cit, p12.

<sup>29</sup> Ibraheem, Abdullrahman Ibraheem, op cit, p59, see also, Al-Shafai, Ahmad Muhammad, op cit, p82.

<sup>30</sup> Shalabi, Muhammad Mustafi, al-Fagh al-Islami ben al-Mthaleeh wal-Waqaeah, Beirut, Al-Dar al-Gameah, 1982 A.D, p163. See also, Eaton, Gai, Islam and the Destiny of Man, Cambridge, the Islamic Texts Society, 1997-1998, p182.

<sup>31</sup> Ibn Majah, Muhammad, Sunan Ibn Majah, Muhammad AbdulBagi (Edi), Cairo, Matbat Esa al-Halabi, no date, H. No. 3940.

- <sup>32</sup> Azizullah, Muhammad, op cit, p15.
- <sup>33</sup> Seraj, Muhammad, op cit, p79.
- <sup>34</sup> Al-Shafai, Ahmad Muhammed, op cit, p95. See also, Husen, Ahmad Faraj, Asoul al-Faqh al-Islami, Cairo, al-Dar al-Gameah, 1986 A.D, p79.
- <sup>35</sup> Gareshh, Ali, Masader al-Shareah al-Islameh Muqaran bi-Masader al-Destoureh, Cairo, Dar Qareeb Il-Tebah, 1399 A.H, 1979 A.D, p61. See Also, Elbakry, op cit, p180.
- <sup>36</sup> Al-Iamadi, op cit, vol. II, p167. See also, Al-Ghazali, op cit, vol. II, p288. See also, Azizullah, Muhammad, op cit, p16.
- <sup>37</sup> Imam, Muhmmad Kamal, op cit, p175. See also, Husen, Ahmad Faraj, op cit, p100.
- <sup>38</sup> Hareshh, Ali, op cit, p65. See also, Shalabi, Muhammad Mustafi, op cit, p166.
- <sup>39</sup> A. D McNair, and D. V. Watts, The Legal Effects Of War, Cambridge, Cambridge University, 4<sup>th</sup> edition, 1966 A.D, p 4.
- <sup>40</sup> L. Oppenheim, International Law, Lauterpacht (Ed.), London, Longmans, 5<sup>th</sup> edition, 1935 A.D, vol... II, p 172. (Hereinafter cited as Lauterpacht - Oppenheim).
- <sup>41</sup> A. Berriedale Keith, Wheaton's Elements of International Law, London, Stevens and Sons limited, Sixth edition, 1929, v II, p 630.
- <sup>42</sup> Clausewitz, Carl von, On War, Antol Rapoport (Ed)., Harmondworth, Penguin Books Limited, 1985. , p101.
- <sup>43</sup> A. Berriedale. Keith, op cit, p 631, See also, Yoram Dinstein, War, Aggression and Self-Defence, Cambridge, Groutius, 1988 A.D, p 13.
- <sup>44</sup> Lauterpacht- Oppenheim, op cit, p174.
- <sup>45</sup> Yoram Dinstein, op cit, p15. See also, El-Far, AbdulWahid Muhammad, Asra Al-harb, Cairo, Ialam al-Kutub, 1975 A.D, p 18.
- <sup>46</sup> De Lupis, Ingrid Detter, The Law of War, Cambridge, Cambridge University Press, 1987, p6. See also, Wilson, Heather A, International Law and the Use of Force by National Liberation Movements, United States, Oxford University Press, 1988, p36. See also, Meng, Werner, War, 1982, vol... 4, Encyclopaedia of Public International Law, pp 282-85.
- <sup>47</sup> De Lupis, op cit, p12. See also, El-far, A., op cit, p14, See also, Yoram, op cit, p17.
- <sup>48</sup> Meng, Werner, op cit, p284.
- <sup>49</sup> McCoubrey, Hilaire, and Nigel D, White, International Law and Armed Conflict, Aldershot UK, Dartmouth Publishing, 1992, p191. See also, Meng, Werner, op cit, p283.
- <sup>50</sup> Wrightm, Quincy, A Study of War, Chicago, The University of Chicago Press, 1942, pp 3-8.
- <sup>51</sup> A. D McNair, and D. V. Watts, op cit, p3.
- <sup>52</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 UNTS 31, (hereinafter cited as the first Geneva Convention); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 UNTS 85, (hereinafter cited as the second Geneva Convention); Convention Relative to the



Treatment of Prisoners of War, Aug. 12, 1949, 75 UNTS 135, (hereinafter cited as 1949 Geneva Convention); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287, (hereinafter cited as the fourth Geneva Convention).

<sup>53</sup> Al Jiohary, Asmeal ibn Hamad, Taj Alugh wa Seha Alarabeh, Cairo, Almatba Alameareh, 1292 AH, vol... I p42. See also, Al Faerozabadi, Mohammed Ibn Yagob, Al Gamos Almuheat, Print Bulag, vol... I p337.

<sup>54</sup> Al Damagany, Aslah Alwagoh wa Alnazier Fi Al Quran Alkaream, Beirut, Dar al-Ilm lil-Malayin, no date, p122.

<sup>55</sup> Al-Qurtubi, Muhammad ibn Ahmad, Tafsir al-Qurtubi, al-Jami li Ahkam al-Qutan, Cairo, Dar al-Kitab al-Arbi, 1387 AH, 1967 AD, v6, p240.

<sup>56</sup> Ibn Manduor, Muhammad ibn Makrm , Lsan al-Arab, Cairo, 1300 AH, Jihad material. See also, Al-Kasani, Abu Bakr ibn Masud, Badai al-Sanai fi Trtab al-Shrai, Beirut, Dar al-Kutub al-Imiyya, 1406AH, 1986 AD, vol... 7, p97.

<sup>57</sup> Al-Qadiri, AbdAllah bin Ahmad, al-Jihad fi Sabil Allah, Jaddah, Dar al-Manara, 1413 A.D, 1992 A.D, vol... I, p48.

<sup>58</sup> Haykal, Muhammad Khair, al-Jihad wal-Qital fi al-Siyasa al-Shr'iyya, Beirut, Dar al-Bayariq 1414 AH, 1993 AD, v1 p39.

<sup>59</sup> Ibid, p41. See also, Alsumaih, Abdulrahman, The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought, Newcastle, University of Newcastle, PhD,1998, p16.(hereinafter cited as Alsumaih, Concept of Jihad)

<sup>60</sup> Al-Kasani, op cit, vol... 7, p97. see also, Ibn Abdean, Mohammad Ameen, Rad al-mohtar ala al-Dar al-Mokhtar, Cario, al-matbah al-Ameareah, 1326 AH, vol... 3, p301.

<sup>61</sup> Muhammad, Olaish, Menah al-Jaleel, Beirut, Dar al-Fikr, 1404 A.H, 1984 A.D, vol... 3, p135.

<sup>62</sup> Ibn al-Qayyim, Muhammad Ibn abe Buker, Zad al-Maad, fi-Khair al-Abad, Beirut, Muassasat al-Risala, 1405 A.H, 1985 A.D, vol... 3, p5.

<sup>63</sup> Al-Zuhaili, Wahba, Athar al-Harb fi al-Fiqh al-Islami, Damascus, Dar al-Fikr, 1401 A.H, 1981 A.D, p34 (hereinafter cited as Al-Zuhaili, Athar al-Harb). See also, Elbakry, op cit, p238.

<sup>64</sup> Khadduri, Majid, War and Peace in the Law of Islam, Baltimore and London, the John Hopkins press, 1955, p68. (hereinafter cited as Khadduri, War and Peace).

<sup>65</sup> Elbakry, op cit, p238. See also Al-Zuhaili, Athar al-Harb, op cit, p36.

<sup>66</sup> Qutb, Sayyid, Fi-Zalil al-Quran, Beirut, Dar al-shrooq, 1397 AH, 1977 AD,~vol... I, p314. (Hereinafter cited as, Qutb, Sayyid, al-Zalil). See also, Shaltut, Mahmud, Jihad in Mediaeval and Modern Islam, Translated and Annotated by Rudolph Peters, E. J. Brill, Belgium, 1977, p3, (Hereinafter cited as Shaltut, Jihad).

<sup>67</sup> Elbakry, op cit, p238.

<sup>68</sup> Al-Bukhari, op cit, vol... I, No. 222. See also, Muslim, op cit, vol... 3, H. No. 1513.

<sup>69</sup> Abo Shuriah, Asmael Abraham, Nazareat al-Harb fi al-sharai al-Islameah, Kuwait, Maktabt al Falah , 1401 A.H, 1981 A.D, p29. See also, Al-Zuhaili, Athar al-Harb, p39.

<sup>70</sup> Shi'i jurists, by contrast with the Sunni jurists, argue that the Imam is an essential condition for waging the Jihad, since the Imam is the only one who can judge when the Jihad should be declared. And since the

absence of the Imam, the duty of Jihad has been suspended, and its resumption would depend on the return of the Imam.

<sup>71</sup> Khadduri, War and Peace, op cit, p61. See also, Elbakry, op cit, p239. See also, Alsumaih, Concept of Jihad, op cit, p17.

<sup>72</sup> Zheer, Gold, al-Aqeedh wa al-sharia fil-Islam, translated into Arabic Muhammad Yusif, Cairo, Dar al-katab al-Masry, 1936 A.D, pp 106-125. See also, Shaltut, Jihad, op cit, p3. See also, Paige, Glenn D, and other, Islam and Non-violence, Honolulu, University of Hawaii, 1993, p10.

<sup>73</sup> Higgins, Rosalyn, Conflict of Interests, U.S.A, Chester Springs [Penn.], 1965. p15.

<sup>74</sup> Al-Haraui, Husayn, al-Islam wal-Mostashragayn, Matbait al-Manar, 1936 AD, 1355 AH, p60.

<sup>75</sup> Al-Murtady, al-Shareef, Nahag al-Balagh, Cairo, Matbait al-Halabi, 1328 A.D, vol... II, p134.

<sup>76</sup> Ibn Rushd, Muhammad ibn Ahmad, Muqadimat Ibn Rushd, Cairo, Matbait al-Saadad, 1325 AD, p379.

<sup>77</sup> According to some Muslim jurists, it is the right of the Imam to sign a treaty with non-Muslims in which the Islamic State could pay tribute to the enemy, in case of the weakness of Islamic to reply the aggression, to avoid any attack.

<sup>78</sup> Al-Zuhaili, Athar al-Harb, op. Cit. p97.

<sup>79</sup> Azam, Abdul Rahman, al-Resalh al-Khalidh, Cairo, Matbait Lagnat al-Tealeefwal-Tarjamh wal-Nasher, 1946 AH, 1365 AD, p198. See also, Al-Zuhaili, Athar al-Harb, op cit, p103.

<sup>80</sup> Ibn Taymiya, Ahmad, Rasalt al-Qatal, Matbait al-Sunah al-Muhammadyh, 1946 AD, 1365 AH, p125.

<sup>81</sup> Al-Zuhaili, Athar al-Harb, op cit, p75.

<sup>82</sup> Ahmad, al-Mosnad, op cit, vol... II, p263.

<sup>83</sup> Abu Zahra, Muhammad, al-Alaqat al-Dawaliy fil-Islam, Cairo, Dar al-Fikr al-Arabi, 1982, p95. (hereinafter cited as Abu Zahra, al-Alaqat )

<sup>84</sup> Mahmasani, Muhammad Subhy, al-Qauon wal-Alaqat al-Dualeeh fil-Islam, Beirut, Dar alIlm lil-Malayin, 1982, p190.

<sup>85</sup> Al-Bukhari, op cit, vol... 4, p63, See also, Abu Dawood, op cit, vol... 3, p158.

<sup>86</sup> Watt, op cit, p86.

<sup>87</sup> Khlaf, Abdul wahab, al-Siyasa al-Shariyya wal-Nzam al-Dawlih fil-Islam, al-Matbaih al-Salafei, 1350 A.H, p76. See also, Abdulaziz A. Sachedina, The Development of Jihad in islam Revelation and History, Johnson, James Turner and Kelsay, John, (Edis) Cross, Crescent, and Sword, New York, Greenwood Press, 1990 A.D, p39.

<sup>88</sup> Abu Zahra, al-Alaqat, op. Cit. p99. See also, Peters, Rudolph, Islam and Colonialism, New York, The Hague, 1979, p123.

<sup>89</sup> Al-Zuhaili, Athar al-Harb, p91.

<sup>90</sup> Al-Zuhaili, Athar al-Harb, p93.

<sup>91</sup> Bukhari, op cit, H. No. 379. See also, Muslim, op cit, H. No. 29.



<sup>92</sup> Taha, Mahmud Muhammad, The Second Message of Islam, New York, Syracuse University Press, 1987, Translation and Interdictions by Abdullahi Ahmad, p134. See also, Khadduri, War and Peace, op cit, p59.

<sup>93</sup> Peters, Rudolph, op cit., p122. See also, Elbakry, op cit, p252.

<sup>94</sup> Qutb, Sayyid, Milestones, Kuwait, Al Faisal Press, Second Edition, Translated by Mohammed Moinuddin Siddiqui, 1410 AH, 1989 AD, p111.

<sup>95</sup> Hilaire McCoubrey & Nigel D. White op cit, p18. See also, Michael Akehurst, A Modern Introduction to International Law, London, HarperCollins, 6th Edition, 1987, p256.

<sup>96</sup> Hilaire McCoubrey & Nigel D. White op cit, p18. See also, Arend, Anthony C & Beck, Robert J, International Law and the Use of Force, London, Routledge, 1993, p13, See also, Higgins, op cit, p16.

<sup>97</sup> Ibid, p15, See also Green, L. C., The Contemporary Law of Armed Conflict, Manchester ,Manchester University Press, 1993, p1.

<sup>98</sup> Arend, Anthony C & Beck, Robert J, op cit, pp 16-17 See also, Michael Akehurst, op cit, p256.

<sup>99</sup> Arend, Anthony C & Beck, Robert J, op cit, pp 16-17.

<sup>100</sup> Hilaire McCoubrey & Nigel D. White, op cit, p19.

<sup>101</sup> The League of Nations Covenant (p 35 Ch2).

<sup>102</sup> De Lupis, Ingrid Detter, op cit, p55. See also, Hilaire McCoubrey & Nigel D. White, op cit, p21. See also, Elbakry, op cit, p329.

<sup>103</sup> Hilaire McCoubrey & Nigel D. White, op cit, p 21-22. See also, Arend, Anthony C & Beck, Robert J, op cit, P22.

<sup>104</sup> Article 15 (7) stated “if the Council failed to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice”.

<sup>105</sup> De Lupis, Ingrid Detter. op cit,p55, See also, Elbakry, op cit, p330.

<sup>106</sup> Michael Akehurst, op cit, p259. See also, Dinstein, Yoram, op cit, p84.

<sup>107</sup> Hilaire McCoubrey & Nigel D. White, op cit, p23. See also, Green, L. C, op cit, p9. See also, Elbakry, op cit, p344.

<sup>108</sup> Michael Akehurst, op cit, pp 261-267. See also, Elbakry, op cit, p339.

<sup>109</sup> See infra 1.7.

<sup>110</sup> Dieter, Fleck, The Handbook of Humanitarian Law in Armed Conflicts, New York, Oxford University Press, 1995, p107. See also, Shhatha, Mustafi Kamal, al-Ehtelal al-Harbi wa-Quad al-Qanon al-Dawali al-Muaiseer, Cairo, Cairo University, PhD, 1977, p12.

<sup>111</sup> Shaltut, Jihad, op cit. p19. See also, Peters, Rudolph, op cit, p18.

<sup>112</sup> Muslim, op cit, Al Jahid section, H. No. 4294. See also, abu-Dawod ,Sunan abu-Dawod, vol... 3, p38. See also, Al-Sanani, Muhammad Ibn Asmail, Subul al-Salam, Beirut, Dar Ihya al-Turath al-Arabi, 1960 AD, vol... 3, p40, See also, -Al-Bahuti, Mansour bin Yousf, Kashf al-Qina, Beirut, Dar al-Fikr, 1402 AH, 1982 AD, vol... 3, p40. See also, Taha, Mahmud, op cit p137.



<sup>113</sup> Ahmad, Mosnad, vol... 1, p231.

<sup>114</sup> Ibn Rushd, Muhammad bin Ahmad, Bidayat al-Mujtahid Wa Nehaet al-Muqtased, Cairo, Maktabat al-Kulliyyat al-Azhariyya, 1389 AH, 1969 AH, v1, p206. (hereinafter cited as Ibn Rushd, al-Bidayat). See also, al-Mawardi, Ali ibn Muhammad, al-Ahkam al- Sultaneeh wal-Welayat al-Deeneh, Beirut, Dar al-Kutub al-Elmiah, 1405A.H/1985 A.D, p37.

<sup>115</sup> Lewis, Bernard, Islam and the West, New York, Oxford University Press, 1993. P47. See also, Schacht, Joseph & Bosworth, C. E, The Legacy of Islam, Oxford, Oxford University Press, 2nd Edition, 1979 AD p175.

<sup>116</sup> Al-Zuhaili, Ather al-Harb, op cit. p151. See also, Higgins, op cit, p15.

<sup>117</sup> Peter, Rudolph, op cit, p19.

<sup>118</sup> Muftah, Daw, Nazret al-Harb fil-Islam wa Itharha fil-Qanoun al-Dwaliyy al-Islami, Puplish Gameat al-Dawah al-Islamah al-Alma, 1416 AH p161.

<sup>119</sup> Al-Balathy, Muhammad, Fatuh al-Buldan, Cairo, Matbait al-Saadh, 1959 AD, p411.

<sup>120</sup> Peters, op cit, p19.

<sup>121</sup> Muslim, op cit, vol. 3, p1357, H. No. 3261.

<sup>122</sup> Abu Zahra, al-Alaqaat, op cit p102.

<sup>123</sup> Al- Naisaboury, Abdul-Alhasan ibn Ahmad, Isbab al-nuzol, Cairo, Matbait Amro al-Halabi, 1990 AD, p131. See also, Ibn Katheir, Ismail, Tafsir Ibn Katheir, Beirut, Dar Ihya al-Turath al-Arabi, 1969 AD, 1388 AH, v2, p592. See also, al-Qurtubi, op cit, v10, p201. See also, al-waqad, Muhammad ibn Omar, Katab al-Magazi, Beirut, Ilam al-Kutub, v1, p290.

<sup>124</sup> Paige, Glenn D, op cit, p10.

<sup>125</sup> Al-Shwkani, Muhammad Ibn Ali, Nail al-Autar Sharh Muntqa al-Akhbar an Ihadeeth Seed al-Akhear, Beirut, Dar al-Geal, 1973, vol. 7, p206.

<sup>126</sup> Muslim, op cit, vol. 12, p48.

<sup>127</sup> Al- Asqalani, Ahmad Ibn Ali Ibn Muhammed, Fatah al-Bari Be-Sharh Sahih al-Bukhari, Cairo, al-Mutbah al-Salafih, H. No. 3014 – 3015.

<sup>128</sup> Abu Zahra, al-Alaqaat, op cit. p103.

<sup>129</sup> Mawdudi, Shariat al-Islam fi al-Jihad wa al-Alaqaat al-Dawliyyah, Cairo, Dar al-Sahwa, 1985 AD, 1406 AH, p171.

<sup>130</sup> Muslim, op cit, vol. 12, p37. See also, Al Shwkani , op cit, vol. 8, p179.

<sup>131</sup> Al-Bukhari, op cit, vol. 6, p158.

<sup>132</sup> Ibid, vol. I, p189. See also, Muslim, op cit, vol. I, p 78.

<sup>133</sup> Muftah, Daw, op. Cit. p207.

<sup>134</sup> Malik, Malik Ibn Anas, Al- Muwta, Cairo, Esa al-Halabi, vol. II, p247.

<sup>135</sup> Muhammad Ibn Ahmad, Sharah al-Siyar al-Kabir, Cairo, al-Shareekah al-Sharqeeh Ili-lanat, vol 2, no date, p43. (hereinafter cited as Al-Sarakhasi, al-Siyar).

<sup>136</sup> Muftah, Daw, op. Cit. p180.

<sup>137</sup> Ibn Manduor, op cit, Dar material, p298.

<sup>138</sup> Fatany, Ismael Lutfy, Ikhtlaf al-Dareen wa-Ithruh fi-Ahkam al-Munakahat wal-Muamalat, Cairo, Dar al-Salam, Second Edition, p20.

<sup>139</sup> Abo Heaf, Ail Sadeq, al-Qanuon al-Dualy al-Am, Alexandria, Manshat Dar al-Maerf, 17<sup>th</sup> Edition, 1997, p109.

<sup>140</sup> Peters, Rudolph, op cit, p11. See also, Schacht, Joseph & Bosworth, C. E, op cit, p174. See also, Lewis, Bernard, Islam and the West, op cit, p47.

<sup>141</sup> Ibn al-Qayyim, Muhammad Abo Baker, Ahkam Ahl al-Dommah, Damascus, Matbat Damshq, 1381 A.H, vol. I, p366.

<sup>142</sup> Al-Kasani, op cit, vol. 7, p131.

<sup>143</sup> Al-Baghdadi, Abdul Qaher, Ketab Asowl al-Deen, Istanbul, Matbat al-Dawlh, p270.

<sup>144</sup> Abo Zahra, al-Alaqat, op cit, p53.

<sup>145</sup> Muftah, Daw, op cit, p95.

<sup>146</sup> Khadduri, Majid, The Islamic Law of Nation, Baltimore, Maryland, The Johns Hopking Press, 1956, p13. (hereinafter cited as Khadduri, Islamic Nation). See also, Al-Zuhili, Athar al-Harb, p173.

<sup>147</sup> al-Kasani, op cit, vol. 7, p131, See also, Bahraui, Abdul Rahman and others, al-Fatawi al-Handeh, al-Matbah al-Amereh, Cairo, 1310 AH, vol. II, p232. See also, Peters, Rudolph, op cit, p12.

<sup>148</sup> It is to be observed that the levy of land tax in Dar Al-Ahd was derived from the custom that predominated between nations of that time, whereby paying money was considered a token of loyalty. This is a rule of jurisprudence related to its time. However, in convention arrangements with contemporary countries, it is not necessary that there be a land tax as it is not part of the general system or rule a matter that cannot be changed, but it is a matter of warlike and political arrangement.

<sup>149</sup> Al-Mawardi, op cit, p178. See also, Al-Zuhili, Athar al-Harb, op cit, p175.

<sup>150</sup> Schacht, Joseph & Bosworth, C. E, op cit, p176. See also, Al-Zuhili, Athar al-Harb, p 175. See also, al-Fahdaui, Ibrameem, Turq Enthai al-Harb fil-Sharai al-Islami wal-Qanon al-Dawaliy, Cairo, Al-Azher University, PhD, 1409 AH, 1989 AD, p248.

<sup>151</sup> Lewis, Bernard, The Political Language of Islam, Chicago, The University of Chicago Press, 1988, p80.

<sup>152</sup> Abe Yousuf, Yaqub Ibn Ibrahim, al-Khraj, Cairo, al-Mutbah al-Salafia, 1384 A.H, p72, See also, Al-Zuhili, Athar al-Harb, op cit, p175.

<sup>153</sup> In this agreement, they had to pay three hundred head of sheep or camels every year and the Muslims in exchange had to deliver food to them, to the same value.

<sup>154</sup> Al-Zuhili, Athar al-Harb, op cit, p175.



- <sup>155</sup> Abu Zahra, al-Alaqaat, op cit, p56.
- <sup>156</sup> Abu Yala, Muhammad Ibn al-Husain, al-Ahkam as-Sultaneeh, Beirut, Dar al-Kutub al-Ilmiyya. 1403 AH, 1983 AD, p248.
- <sup>157</sup> Khadduri, Islamic Nation, op cit, p12. See also, Al-Mawardi, op cit, p138.
- <sup>158</sup> Ibn al-Humam, Kamal al-Dean, Fath al-Qadeer, Beirut, Dar al-Fikr, vol. 5, p462.
- <sup>159</sup> Abu Zahra, al-Alaqaat, op cit, p57. See also, Al-Zuhili, Athar al-Harb, op cit, p176.
- <sup>160</sup> Abu Zahra, al-Alaqaat, op cit, p52. See also, al-Zuhili, Athar al-Harb, op cit, p176.
- <sup>161</sup> Ibn Al-Humam, op cit, vol. 4, p351. See also, Khadduri, Islamic Nation, op cit, p11.
- <sup>162</sup> Al-Zuhili, Athar al-Harb, op cit, p176. See also, al-Fahdaui, op cit, p258.
- <sup>163</sup> Khlaf, Abdul-Wahab, al-Siyasa, op cit, p88.
- <sup>164</sup> Schacht, Joseph & Bosworth, C. E, op cit, p175.
- <sup>165</sup> Khlaf, Abdul-Wahab, al-Siyasa al-Shariyya, Cairo, Dar Al- Ansar lltbah wa alnasher, matbat Al-taqdwm, 1397 A.H, 1977 A.D, pp 29-67.
- <sup>166</sup> Al-Shafai, Mohammed Ibd Adrees, Alum, Der al-Marefah, vol. 4, p201. See also, Al-Bahuti, op cit, vol. 3, p228. See also, al-Hatab, Muhammad ibn Abdurrahman, Mauaheb Al-jaleel sharh Mukhtaser Khleel, Tarabls, Libya, Maktabt al-Najah, vol. II, p 135.
- <sup>167</sup> Abu Zahra, Muhammad, Nazareat al-Harb fil-Islam, Auesh, Muhammad Tawfeeq (Ed), Derasat fil-Islam, Cairo, al-Majles al-Ala il-Shoun al-Islamih, 1380 A.H, 1961 A.D., p28.
- <sup>168</sup> Darraz, Mohammed Abdul-Allah, Al-Qanoun al-Dawaliy al-Am fal-Islam, aleskandary, Al-Majalh al-Mesreeh il-Qanon al-Dawaliy, 1949, vol. 5, pp 1- 6
- <sup>169</sup> Al-Tabari, Ibn Jarir, Tafseer al-Tabart, al-Matbah al-Ameereh, Cairo, vol. 3, p152. (hereinafter Al-Tabari, al-Tafseer)
- <sup>170</sup> El-far, A., op cit, p34.
- <sup>171</sup> Shaltout, Mahmoud, al-Islam wl-Aqlaqat al-duylya fal-salm wal-Harb, Cairo, Maktab Shaykh Jami al-Azhar lil-Shuun al-Ammah, 1951. pp 37-38.
- <sup>172</sup> Mansour, Ali Ail, al-Shreah al-Islameh wal-Qanoun al-Dawaliy, Cairo, Mataba al-Ahram al-Tejareeh, 1971 A.D, 1390 A.H, p281.



## **CHAPTER TWO:**

### **Prisoners of War**

#### **Introduction:**

Before we can consider what special status, rights or treatment may be accorded to prisoners of war, it is necessary to clarify what is meant by the term 'prisoners of war', and to which categories of people it may be applied. This is the purpose of the present chapter. The discussion is presented in two main sections. In the first, definitions of prisoners of war are considered, first in Islamic law, then in International law. The categories of persons who fall within the definition are identified and attention is drawn to the expansion of these categories in international law, in the light of the experience of the Second World War. In the second part of the chapter, attention is drawn to specific categories of persons who are not treated as prisoners of war.

#### **2.1. Definitions of Prisoners of War:**

In this section, the concepts of prisoner of war, and the categories of people who may fall within the scope of the definition, are discussed. First the Islamic perspective is presented; then, the relevant provisions of international law are discussed.

### 2.1.1. In Islamic Law

The Arabic word for prisoner is *Asseer* which is derived from the word *Eessaar* which literally means a shackle or fetter which is used to fasten things firmly. Later the word *Eessaar* was used for those who are captured in war, since they are usually tied firmly to make sure they will not be able to escape. Eventually, the original meaning of the word was forgotten and the word was used as an adjective for those seized in war, even if they were not bound. *Asseer* is the singular and its plural is *Asra*.<sup>1</sup>

The concept of the word prisoner (*Asseer*) could be extended to include all those who cannot act freely for themselves. The Prophet (pbuh) described a person who was detained for debt as a prisoner (*Asseer*). It has been narrated by al-Hurmass Ibn Habeab that his father said, “I came up to the Prophet with a man who is in debt to me”. The Prophet said, “Attach him”. At the end of the day, the Prophet said, “What did your prisoner (*Asseer*) do?”<sup>2</sup>

Under Islamic law, the use of the word *Asseer* (prisoner) does not differ from what has been stated above (the linguistic meaning). Therefore, many Islamic scholars did not discuss the definition of prisoners of war directly and employed the word *Asseer* to include all those who are taken in the war, men (*Asra*), or women and children (*Sabi*), whether they took part in the battle or not.

Imam al-Sarakhsiy did not make a distinction between men and women or children, and classed them all as prisoners (*Asra*). He stated, “The head of the Islamic State has the

right to kill the men among the captives (*al-Asra*), or else save them and distribute them among the troops. He must consider the interests of the Islamic Nation, since the Prophet (pbuh) killed the (*Sabi*) women and children of Banu Quradah, and allocated the (*Sabi*) of Aootaas”.<sup>3</sup>

Al-Khrashi from the Malikai School stated, “Choosing the fate of prisoners of war (*Asra*) by executing, setting free, ransoming, paying tribute or enslaving them...all these options apply with regard to men. Whereas, children and women, they just face two alternatives, enslavement or ransom”.<sup>4</sup>

In the same way, the Imam of the Shafi School stated, “When nonbelievers are captured and come under the control of the Islamic authority, their fate will be one of two (or they will be liable to one of two options): With regard to the adults, the head of the Islamic State has the right to choose to kill them all or some of them, or release them or some of them with or without ransom ... but those who are still immature and women, however they were captured, they will be treated as spoils of war”.<sup>5</sup>

Ibn Qudamh of the Hanbali School stated, “If the head of the Islamic State detains the enemy he has the right to decide to kill them or release them without ransom..., the captives (*Asra*) from outside the Islamic State are divided into three categories: first, women and children; second, men from the people of a book and Magians; third, pagan men”.<sup>6</sup>

The above texts show that some Islamic scholars employed the word prisoners (*Asra*) in a general way to comprise men, women and children, and they did not distinguish between



(*Asra*) men or (*Sabi*) women and children, even though they gave special rules for each category.

On the other hand, some Islamic scholars gave a direct definition of prisoner of war. Al-Mauardi (450 A.H) from the Shafia School defined prisoners of war as “those fighting men among the unbelievers whom Muslims captured alive”.<sup>7</sup>

In addition, Abu Yala (458A.H) from the Hanbali School defined them as “those of the unbelievers’ fighters whom the Muslims overcome and arrest”.<sup>8</sup>

From the foregoing definitions, it is clear that there is an agreement on the meaning of the word prisoners (*Asra*), and there are five major criteria that must be met for a person to be a prisoner of war (*Asseer*): it must be a man, a fighter, an unbeliever, captured by Muslims and alive. However, this definition (limitation) of the word prisoners (*Asra*) does not mean that it could not include others (non fighters), as the general meaning of (*Asra*) comprises warriors men and non-warriors like women and children, even though the word (*Asra*) was employed particularly for man and the word (*Sabi*) was employed particularly for woman and children and those considered equivalent to them, such as the aged and disabled.<sup>9</sup>

Additionally, the survey of Islamic history shows another form of prisoners of war. Prisoners of war are not just those who were captured during the war or after it, but could include those unbelievers who might encounter Muslims at a time when there is no actual fighting between Muslims and their adversary. This view stems from the fact that, from the advent of Islam, people were separated into two groups with different principles,

namely, Muslims and unbelievers. The unbelievers made every effort to stop Islam and damage Muslims. At that time, a state akin to war existed between the two groups. Therefore, if a non-Muslim fell into the hands of Muslims he was considered as a prisoner of war, and this, as indicated in Chapter One was the reason which led Islamic scholars to divide the world into three parts, namely, *Dar al-Islam*, *Dar al-Harb* and *Dar al-Ahd*.<sup>10</sup>

At the time of the Prophet (pbuh) there was an incident when unbelievers fell into the hands of Muslims and they were treated as prisoners of war, even though there was no actual war between them. It is reported that the Prophet (pbuh) dispatched AbdulAllah Ibn Jahash in a company with eight of his friends in the first year of *al-Hegra* (623A.D), and this group arrested two men from the unbelievers, namely, al-Hakam Ibn Kesan and Othman Ibn AbdulAllah Ibn Matoun, and brought them before the Prophet (pbuh). They were the first prisoners in Islam. Later, the Quraish sent to the Prophet asking to pay a ransom for their release. The Prophet rejected their request and said he would detain them until they released his friends, namely, Saad Ibn Ebi Waqaas and Otpah ibn Qazzwan who were detained by the Quraish. Afterwards, they were exchanged.<sup>11</sup>

In this case, we observe that there were two Muslims prisoners and the same from the non-Muslims, and the Prophet (pbuh) applied one of the rules applicable to prisoners of war (exchange) even though there was no actual war, in view of the fact that the reason for AbdulAllah's company was to collect news of the Quraish.

As an additional example, it has been narrated that on the Day of Badr, the first armed conflict between Muslims and unbelievers (the Quraish tribe) in the second year of the

*Hegra*, January 624 A.C, Oamaeh Ibn Khalif gave himself up to AbdulRahman Ibn Auf and he agreed to protect them. When Belal (one of the Prophet companion) saw him, he insisted on killing him, since he had been tortured by him in Makkah. Later, AbdulRahman said, “May Allah forgave Belal; he executed my prisoner (*Asseere*)”.<sup>12</sup> In this incident, AbdulRahman Ibn Auf called Oamaeh a prisoner (*Asseer*) even though he was not captured but had surrendered voluntarily.<sup>13</sup>

Furthermore, according to some Islamic thinkers, all those who entered the territory of Islam, such as travellers, tradesmen and manufacturers, could be captured and treated as prisoners of war if they fell into the hands of Muslims. Imam Malik says “On the subject of those who are found on the coast of Islamic territory and they claim that they are tradesmen or likewise, their claim must not be accepted... and it is up to the head of the Islamic State to make a decision in their case”.<sup>14</sup>

Ibn Taimiah held the view that the status of prisoner of war may come to exist even without fighting, for instance, “If a non-Muslim was found within the border of the Islamic state as a result of shipwreck, entered the Islamic territory by a mistake or was arrested by trickery”.<sup>15</sup>

According to Haykal, to kidnap unbelievers, individually or collectively, and confine them and treat them as prisoners of war, was legitimate under Islamic law since it is considered a lawful act of war. The only condition is that these kidnapped must not be among those who have the benefit of *Aman* (guarantee of safe conduct) from the Islamic state.<sup>16</sup>



Undoubtedly, the above views apply if the situation between Muslim and non-Muslims was a state of war, as in such a situation it is allowed for Muslims to capture non-Muslims, whether they are found in the Islamic territory without an *Aman*, or found outside the Islamic territory. However, if the situation is not a state of war, then it is prohibited for a Muslim to capture or take any valuable things, since the sons of Adam were originally free.<sup>17</sup>

At the same time, it is allowed to capture unbelievers and detain them as prisoners if they entered the territory of Islam without an *Aman*. If they have obtained the *Aman*, they cannot be considered as prisoners but as *Ahl al-Dhammi*, which means that they will be treated equally with Muslims.<sup>18</sup>

An adversary combatant can obtain *Aman* if one of the Muslims says, 'You are safe', 'Do not be afraid', 'Do not worry', or any word that has the meaning of safety. Omar Ibn al-Khatab (second caliph) sent a letter to one of his commanders saying, "I am informed that some of your men, when they are going after their enemy and the enemy escapes and they cannot catch him, say, 'Do not be anxious', then when they have overtaken him, kill him. I swear by God, if I knew anyone did that, I would execute him".<sup>19</sup>

Khadduri confirmed, "The procedure of granting *Aman* is very simple and there is no disagreement among the jurists on it. Once the Harabi's intention of requesting the *Aman* was known, regardless of the language he spoke, any word or sign of approval was enough to constitute granting it".<sup>20</sup>

Al-Sarakhsiyy stated, "If the Muslims besiege an unbeliever's castle, and four people (its

people) look out from behind the walls and say, ‘Grant us the *Aman* and we will come out to discuss the subject of peace’ if they are given it, then twenty men come out, if the Muslims know the four men, then they will be safe and the rest will be treated as prisoners of war...but if the Muslims do not recognize the four men and each one of them claims that he was given the *Aman*, then all of them must be safe and they cannot be killed nor captured”.<sup>21</sup>

In addition, an unbeliever combatant can obtain the *Aman* by claiming it for himself, even if a Muslim disputes his claim. Presuming that an unbeliever combatant came with a Muslim to the camp of Muslim, and the Muslim said “I captured him”, while the unbeliever combatant said “I got the *Aman*”, in this case, the claim of the unbeliever would be accepted, as long as there was no sign to support the Muslim claim, such as the unbeliever being tied or there being a witness. Since he arrived like a *mustamain* (an unbeliever who has obtained the *Aman*) just as if he appeared alone he could gain the *Aman*, so he can if he comes with a Muslim.<sup>22</sup>

The foregoing discussions show that the meaning of the word prisoner (*Asseer*) according to Islamic scholars can be extended to include the following categories:

- 1 An unbeliever fighter who is captured by Muslims in the combat zone.
- 2 All unbelievers who are captured by Muslims without fighting, such as tradesmen, manufacturers and traveller, on condition that a state of war exists between Muslims and non-Muslims, regardless whether they were captured by kidnapping or deception or they entered the Islamic State by mistake.
- 3 The general meaning of (*Asseer*) prisoner includes all those who fell into the

hands of Muslims, regardless of their gender or age, although Islamic scholars use the term *Asra* for men and *Sabi* for women and children.

As mentioned above, the motive of including all these categories is that the situation between the Islamic State and others was like a state of war and war between them was imminent. However, if any of the above listed has the benefit of *Aman*, then they must be excluded from those who can be captured and treated as prisoners. These include ambassadors and envoys of the Adversary State, those who enter the Islamic State by a legitimate method and citizens of a State which has a convention with the Islamic State. Furthermore, if the Islamic State concludes a treaty with another (non-Islamic State) which stipulates exclusion of some categories from capture (as prisoners) such as women and children and others, and then there is a war, the Islamic State is obligated under Islamic law to fulfil the treaty obligation, as long as the treaty is respected by the other party. In this case, those who are excluded will be treated in Islamic law as *mustamain*, even if there is war between their country and the Islamic State.<sup>23</sup>

### **2.1.2. In International Law**

In international law, not all those who fall in the course of armed conflict into the hands of the adversary become prisoners of war and entitled to the status of prisoners of war and the legal protection related therewith. Therefore, the law of armed conflict recognizes two classes, namely, combatant and non-combatant. The combatant who can wage war and attack the enemy, upon capture will not be liable to be tried as a normal criminal, but is accorded the special status of prisoner of war. In contrast, non-combatants cannot be



legally attacked, and they cannot themselves commit take action of hostility against the enemy, and if they do so they will be liable to be tried as war criminals.<sup>24</sup> Consequently, it is important to have a clear criterion to distinguish non-combatants from combatants, as any confusion of the division between the two classes will inevitably endanger protection granted under the law of war. It is one of the functions of the law of armed conflict to ensure that a member of one category who is entitled to special status or treatment does not enjoy the right of the other. In other words, a person cannot be a combatant and non-combatant at the same time.<sup>25</sup>

In ancient times, there was no attempt to categorize those who were entitled to the status of combatants; there was merely a description of what was considered as proper conduct by those engaged in hostilities. However, even though classical writers made no attempt to give a definition of “combatant”, some of them afforded a definition of “soldiers”. Ayala stated, “Those only are called soldiers who have had the oath put to them and have taken it and have been incorporated in the ranks. Sailors and oarsmen in the navy are soldiers”.<sup>26</sup>

The designation of combatant was a subject of a vivid debate in international conferences concerning the laws and customs of war, since such definition was considered as the first step of the application of the law of war.

The first attempt to provide an international conventional definition of combatant was made at the Brussels Conference of 1874,<sup>27</sup> where a strong discussion took place between, on the one hand, big States, particularly Germany which tried to restrict the definition of combatant to members of the regular armed forces, and on the other hand,

small States, like Belgium and Switzerland, which had inadequate regular armed forces, and argued for expansion of the definition of combatant to include, in addition to the regular armed force, other organized armed groups who are not part of the regular armed force.<sup>28</sup> Agreement was reached at the end of the conference and the following categories were accepted as combatants:

- 1 the army, including militias constituting the army or forming part of it;
- 2 other militias and volunteer corps who satisfy the following conditions: being commanded by a person responsible for his subordinates, having a fixed distinctive emblem recognizable at a distance, so they may be distinguished from the civilian population, carrying arms openly and conducting their operations in accordance with the law and customs of war;<sup>29</sup>
- 3 the *levee en masse*, that is, the population of an unoccupied territory, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves, provided that they respect the laws and customs of war.<sup>30</sup>

The last one of these categories, namely, *levee en masse*, does not include groups of the population of occupied territory who take up arms subsequent to the occupation in order to harass or engage the occupant.

However, at the end of the Brussels Conference 1874, it seemed that there was no wish to expand the concept of combatant to include persons engaged in private or civil war. In addition, it was felt that the population of an occupied territory had no right to defend themselves against the occupying power and if they did so they would not be treated as



prisoners of war but as common criminals, and the question under which situation the population of an occupied territory could choose to resist by arms was left unanswered. It was left to the 1899 Hague Conference<sup>31</sup> to codify the law concerning who may be identified as a combatant and treated as a prisoner of war upon capture. However, the Hague Conference 1899 failed to change the status quo, and the solution which was adopted at that conference was the same as that of the Brussels Conference 1874. In the same way, at The Hague Conference 1907<sup>32</sup> there was no modification; the only change which was approved at that Conference was the condition of carrying the arms openly, in addition to the condition of respecting the law and customs of war, in the case of the population of an unoccupied territory.<sup>33</sup> However, in the 1929 Hague Convention,<sup>34</sup> on one hand, Article 1 gave combatant status to those persons within the categories specified in the 1907 Hague Regulation, and on the other hand, it added persons belonging to the armed forces of belligerents who are captured in the course of operations of maritime or aerial war.<sup>35</sup>

As indicated above, there was no express conclusion regarding whether an armed resistance movement operating in occupied territory should be treated as a combatant, in the Brussels Conference 1874, the 1899 Hague Conference, the 1907 Hague Regulation or the 1929 Hague Convention. Thus, resistance movements in occupied territory were not protected under the above Conventions, even if they fulfilled the four conditions set down for militias and volunteer corps. This was the view held by Germany during the war.

According to some writers, this view was wrong, since the debates at the Brussels and Hague Conferences focused on the right of the population of an occupied territory (not



organized armed groups) to raise an army against the occupying power, and even this question was left open. In addition, after the Second World War, the judgment of the war crime tribunals touched upon the legality of the organized resistance movement in German-occupied territory (France), apparently based on the assumption that members of the resistance movement should have been treated as prisoners of war upon capture if they complied with the four conditions.<sup>36</sup>

The experience of the First and the Second World Wars provided bitter experiences of occupation, and there was a feeling that, on humanitarian grounds, since most of the wars in the twentieth century involved the civilian population, the law of war should take this into account and expand the categories of combatant who will be entitled to the treatment of prisoners of war upon capture. Therefore, in Geneva, at the Diplomatic Conference of 1949, government experts recommended that the new convention under discussion should expand the categories of those entitled to prisoner of war status; that the new convention should itself enumerate these classes of persons and not refer to the provision of another convention; and finally, that such persons should benefit from the protection of this convention, should they fall into the power of the enemy.<sup>37</sup>

The objective of substituting the phrase “who have fallen into the power of the enemy” for the previous phrase, “in case of capture by the enemy” which was used in the preceding convention, was to cover those who fall into the hands of the enemy without involving any sort of action by the capturing power, such as the phrase “capture” requires, for example, by voluntary surrender. Consequently, under the 1949 Geneva Convention, enemy personnel who surrender voluntarily are entitled to prisoner

of war status and not to other status.<sup>38</sup>

With regard to the categories of persons entitled to be treated as prisoners of war upon capture, the 1949 Geneva Convention did not give a definition of the combatant as such, but its definition of “prisoners of war” was consistent with the similar criteria of the Hague Regulations.<sup>39</sup> Article 4 of the 1949 Geneva Convention specifies the categories of persons who are entitled to prisoners of war status,<sup>40</sup> in what follows, these categories will be examined in details.

#### **2.1.2.1. Members of the armed forces.**

The most obvious and probably the most numerous group entitled to prisoner of war status is members of the regular armed forces of a party to the conflict. It seems to be generally accepted that the State has the right to decide the system of recruitment of its armed forces whether by conscription or voluntary enlistment, and it is for the municipal law to specify what category of forces form part of its regular armed forces. Therefore, militia or volunteer corps constituting or forming part of the armed forces of a party to the conflict are considered as regular forces, and it is not necessary for the power upon which such a force depends to be accepted by the capturing power for its army to be entitled to prisoner of war status upon capture.<sup>41</sup> However, the parties to an armed conflict must take all measure to avoid children under the age of fifteen from taking any part in the hostility and must refrain from recruiting persons of that age into their armed conflict. But if children take part in the hostility and fall into the hands of the enemy, then they will benefit from relevant special protective measures, whether they are prisoners of

war or not.<sup>42</sup>

According to some writers, members of the armed forces must meet four conditions to be entitled to prisoner of war status upon capture. They must have a responsible commander; wear a fixed distinctive sign; carry arms openly and conduct their operation in accordance with the law and customs of war.<sup>43</sup> The reason why the preceding conventions did not make an explicit reference to the four conditions in connection with the regular armed forces was that they were assumed to fulfil these conditions in any case.<sup>44</sup>

It seems to be accepted that these requirements apply to the regular armed forces. De Lupis argued that “there is no textual support for the idea that members of regular armed forces should wear uniform, on the other hand, there is ample evidence that this is a rule of the law which has been applied to a number of situations to ascertain the status of a person”.<sup>45</sup> Therefore, a member of the regular armed forces who is captured while engaged in espionage out of uniform is not entitled to prisoner of war status and may be treated as any other civilian captured under the same conditions.<sup>46</sup> Any other understanding would be unrealistic, and it would mean that the danger of operating as a spy could be immunized simply by claiming that the spy is a member of the armed forces. This could lead members of the armed forces to act in a manner which is prohibited by other areas of the law of armed conflict and avoid the penalties, by claiming to be entitled to prisoner of war status.<sup>47</sup>



With regard to members of the regular armed forces of a State party to the conflict who are not nationals of the State concerned, the 1949 Geneva Convention<sup>48</sup> makes it clear that aliens serving in a belligerent force who fall into capture will be entitled to the same treatment as prisoners of war who are of the nationality of the belligerent.<sup>49</sup>

Finally, it is important to note that not all members of the regular armed forces are combatants,<sup>50</sup> even though the majority of the armed forces, of course, will be combatants. For example, medical personnel and chaplains who cannot take an offensive part in the battle and who are not a legitimate military target, upon capture will have a special standing; they are, in effect, “retained” rather than being prisoners of war.<sup>51</sup>

#### **2.1.2.2. Members of Other Militias and Members of Other Volunteer Corps, Including Those of Organized Resistance Movements, Belonging to a Party to the Conflict and Operating in or outside Their Own Territory.**

International law has gradually allowed the status of combatant and, of course, the status of prisoner of war upon capture, to individuals who are not members of the regular armed forces. Under the 1949 Geneva Convention, militias or volunteer corps other than those forming part of the regular armed forces will be considered as combatants provided that they meet certain requirements. Apparently, the same will be applicable to the members of any militia who are not under the municipal law part of the regular armed forces of the State.

The experience of Second World War, when many countries in Europe and Asia were

occupied by the enemy, led to a major breakthrough in extending the categories of individuals who would be considered as combatants and prisoners of war upon capture. During the Second World War, so-called resistance movements appeared in the countries occupied by the enemy, whether the country was totally occupied or part of it. At the 1949 Diplomatic Conference, after a prolonged discussion, a provision was made for members of the organized resistance movement to be entitled to the status of prisoner of war upon capture. Organized resistance movements, in the view of Article 4, include organized resistance movements operating in home territory occupied by the enemy, as the usual concept. The term also applies to those operating outside their home territory, logically, if they are active in the territory of the enemy (the occupying power) to resist occupation of their homes or if they are operating behind enemy lines as the enemy withdraws.<sup>52</sup>

However, States that had experience as wartime occupying powers and whose own territory was not occupied, who were concerned with the need to maintain order in occupied territory and to protect their personnel, feared the possible adverse future consequences of an overly wide provision. Therefore, many limitations were set up which may prevent the normal resistance movement from meeting these requirements and so qualifying as prisoners of war upon capture. The organized resistance movement must have an organizational connection with one of the States which is party to the conflict. Such organization distinguishes them from criminal organizations. However, in the confused circumstances of war, where a government is in exile while its territory is occupied, the organized movement may be taken under the command of a supporter.<sup>53</sup>



Under the 1949 Geneva Convention, militias and volunteer corps and members of the organized resistance movement are required to fulfil four conditions to be qualified as combatants and treated as prisoners of war upon capture.<sup>54</sup> First, they must be commanded by a person responsible for his subordinates. In other words, there must be some commander who gives orders to the individuals who are supposed to obey, and who can enforce discipline within the group. The objective of this condition is to guarantee that the group is operating according to the law and customs of war, and in case of violation, the commander will enforce discipline. Second, they have to have a fixed distinctive sign recognisable at a distance. The purpose of this condition is to distinguish combatants from civilians and to protect members of the armed forces of the occupying power from deceitful attacks by individuals who appear as not dangerous, in civilian cover. Third, arms must be carried openly. The purpose of this condition is so that the enemy is not led to believe that the individual concerned is an unarmed civilian. A personal hand weapon or a submachine gun carried openly would comprise fulfilment. Fourth, such groups must conduct their operations in accordance with the laws and customs of war. Certainly, it seems to be acceptable that if such groups are permitted to claim the protection of the law and customs of war, in return, they must themselves act in accordance with those laws and customs.<sup>55</sup>

In addition, many forms of war have come into existence since 1949, notably, the case of guerrilla or other less formal types of warfare carried out in wars such as those in Vietnam, in Afghanistan and Lebanon. Consequently, a new type of international armed conflict was created by the First Protocol<sup>56</sup>: armed conflicts in which peoples are fighting



against colonial domination and alien occupation and against fascist regimes in the exercise of their right to self-determination will be considered as international conflicts to which the 1949 Convention and the First Protocol will be applied.<sup>57</sup> Therefore, people involved in such a conflict are entitled to combatants' right and duties and to prisoner of war status upon capture.<sup>58</sup>

In practice, the four requirements cause significant difficulties, and it is clearly recognized that it is rarely that all those requirements can be met. If an organized resistance movement operating in occupied territory is, usually, working clandestinely, how could it be commanded by a person responsible for his subordinates? Moreover, its members cannot possibly act in accordance with the second of these requirements (have a fixed distinctive sign recognisable at a distance) or carry their arms openly at all times (the third requirement) and hope to survive. In addition, the fourth requirement serves as a convenient excuse for the occupying power to deny all the captured of the resistance movement prisoner of war status and treat them as terrorists, because some members have committed war crimes. These difficulties led to their re-evaluation at the Diplomatic Conference that produced the First Protocol.<sup>59</sup>

Article 43 of the First Protocol provides that the armed forces of a party to a conflict consist of all organized armed forces, groups and units, including irregulars, provided that they are under a commander responsible to that party for the conduct of its subordinates, even if the latter is represented by a government or authority not recognized by the enemy party. Such forces must be subject to an internal discipline system which

enforces relevant rules of international law applicable in armed conflict.<sup>60</sup> If there is any violation of the laws of war by members of the armed forces, this will not prevent a combatant from retaining his status as a combatant or his right to be treated as a prisoner of war upon capture, except for a failure to comply with the minimum rule of distinction which will be pointed out next.

Under the First Protocol, the requirements that a fighter must wear a fixed distinctive sign recognizable at a distance and carry arms openly at all times have been relaxed. While combatants are obliged to distinguish themselves from civilian population, for the purpose of protecting the latter, Article 44 recognizes that it is not always possible for them to comply with the rules of distinguishing themselves from civilians, due to the nature of hostilities. In such a case, members of fighter forces will still retain the status of combatants and treated as prisoners of war if captured, provided they carry arms openly during each military engagement and during such time as they are visible to the adversary while engaged in military operations prior to an attack.<sup>61</sup> Where these requirements are met, there is no legal basis to deprive such a fighter of prisoner of war status. However, if a combatant fails to distinguish himself, or if he hides his weapons while visible to and moving toward the enemy, he will forfeit his right to be treated as a prisoner of war. This person will, however, benefit from equivalent protection and not be treated as a common criminal.<sup>62</sup>

### **2.1.2.3. Members of Regular Armed Forces Who Profess Allegiance to a Government or an Authority Not Recognized by the Detaining Power**

During the Second World War, a number of countries were occupied by the enemy and their governments were in exile while their members were fighting the occupied power in their territory. For example, French forces fighting under General de Gaulle against Germany in on behalf of the French Provisional Government, located in Algiers, which was not recognized by Germany. In addition, Italian Forces fought against Germany in Italy. In the light of these experiences, it was proposed to the 1947 Conference of Government Experts, by the ICRC <sup>63</sup> that prisoners of war status should be granted to all members of this class upon capture.<sup>64</sup> This proposal was adopted by the 1949 Diplomatic Conference and became Article 4A (3) of the 1949 Geneva Convention, according to which members of regular armed forces, who profess allegiance to a government or an authority not recognized by the Detaining Power, have the right to take part in the hostility and are entitled to prisoner of war status in case they fall into the hands of the adversary.<sup>65</sup>

### **2.1.2.4. Persons Who Accompany the Armed Forces without Actually Being Members Thereof.**

Under the 1949 Geneva Convention, the status of prisoner of war was expanded to include persons who are not military personnel. They are considered as civilians; therefore, they have no right to participate in the fighting. However, if they fall into the hands of the enemy they have the right to be treated as prisoners of war.<sup>66</sup> This category includes “civilian members of military aircraft crews.” This was a new phenomenon and



included a large number of civilians who were employed in such circumstances. However, some suggest that this category should be eliminated, since it would lead to certain problems, as the presence of civilians among the crew of military planes is considered unlawful.<sup>67</sup>

As a result of many journalists being killed while covering a conflict, after capture by the belligerents, in the 1949 Geneva Convention, the status of prisoners of war was granted to “war correspondents.” This includes war correspondents who are full-time newspaper or other media reporters, provided that they carry identity cards signifying their status and are attached to the armed forces.<sup>68</sup>

The question regarding the status of civilians captured while working for the armed forces party to a conflict arose during the Second World War.<sup>69</sup> Consequently, the 1949 Geneva Convention included “Members of labour units” as well as members of “services responsible for the welfare of the armed forces.” This category would encompass entertainers, civilian ambulance drivers and all other individuals whose work is likewise concerned with the well-being of the armed forces, whether they work temporarily or permanently.

The only condition that the persons covered by Article 4 A (4), have to meet, to gain the status of prisoners of war upon capture, is that they “have received authorization from the armed forces which they accompany”. For that purpose the armed forces shall provide them with identity card similar to the model annexed to the 1949 Geneva Convention.

This provision is equivalent to what is provided by the preceding conventions. However, a change has been made in the language of the new Convention, as in its predecessor, the possession of such a card was an essential condition for entitlement to prisoner of war status.<sup>70</sup> Contrary to that, under the new convention, the possession of such a card is no longer a necessary condition and it is sufficient, for the individual to have the right to be treated as a prisoner of war, that he was issued with such a card. Therefore, in the absence of the identity card, the individual will not be deprived of his right, and it is enough that the individual can prove, by the identity card itself or any other evidence, that such a card was in fact issued to him by the military authorities.

#### **2.1.2.5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law**

In international law there is no generally accepted definition of “Merchant ship”. However, it can be defined as a vessel other than a warship which is exclusively employed for commercial or fishery purpose or transporting passengers for profit, regardless of whether it is owned privately or by the State.<sup>71</sup> In addition, it is settled among States that a merchant ship is not allowed to attack any enemy ship, whether public or private; if it does so, it will be considered as a pirate-ship and the members of the crew will be liable to be treated as criminals.<sup>72</sup> In the same way, in international law there is no definition of a “civil aircraft”, but they can be defined as those aircraft, privately or State-owned, employed for civilian purposes, other than military aircraft and

State aircraft.<sup>73</sup>

During the First and Second World Wars, members of merchant crews were detained but there was no assurance as to exactly, what the status of captured merchant seamen would be, as prisoners of war or civilian internees. This was due to the disregard of the provision which was provided by the Eleventh Hague Convention 1907.<sup>74</sup> Therefore, the 1949 Geneva Convention provides that merchant seamen will be prisoners of war and this includes all members of crew, officers and men. In addition, since the use of aircraft in times of war has become more frequent, as it is quicker than merchant ships, and many State use aircraft instead of merchant ships, this provision also applies to the crew of civil aircraft. Additionally, a merchant ship or civil aircraft must fly the flag of a party to the conflict to entitle the member of crew to prisoner of war status if captured. However, the status of the passengers of merchant ships or civil aircraft is not regulated. It seems that, if arrested, they will be treated as civilian internees, unless they are military personnel.<sup>75</sup> Finally, crew members will be entitled to the status of prisoners of war if there is no possibility of more favourable treatment under other provisions of international law.

**2.1.2.6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war**

Generally speaking, civilians in international law are regarded as non-combatants who have no right to take part in the hostility or to use arms, even in self-defence, against the enemy. In return, they are protected under international law from being attacked.<sup>76</sup>



However, an exception is the situation of the *levee en masse*. These are the people of a non-occupied territory who rise in arms to resist imminent invasion of their territory by the enemy without having had time to organize in regular units.

The status of the *levee en masse* emerged in modern warfare in the Franco-Prussian war (1870-71) where many members of the civilian population of France rose up suddenly to resist the advance of the invading Prussian army.<sup>77</sup> Their status was first included in the Brussels Conference of 1874 article 10<sup>78</sup> and now is incorporated in the 1949 Geneva Convention Article 4A (6). According to Article 4A (6) of the 1949 Geneva Convention, there are some conditions that must be met for such a resistance movement to be considered as a *levee en masse*, and its members treated as combatants and have prisoners of war status upon capture. These conditions are:

First, for such a movement to be considered as a *levee en masse*, it must be in a territory which is not occupied by the enemy<sup>79</sup> (Inhabitants of a *non-occupied* territory). Green argues that the *levee en masse* “may be raised with regard to any part of the national territory which had not been occupied by the enemy”.<sup>80</sup>

The purpose of this condition is to distinguish between the resistance of the civilians of non-occupied territory who resort to take arms against the invasion of the enemy of their homeland (the *levee en masse*, Article 4A [6]), and the resistance of civilians of occupied territory, by the enemy who has already occupied their homeland (the organized resistance movement, Article 4A [2]). It follows that *levee en masse* can exist only in territory not yet occupied and that a resistance movement which is organized and freely

operating in an occupied territory does not fall into the category of the *levee en masse*.<sup>81</sup>

Second, it is required that the civilian population of non-occupied territory take up arms “spontaneously”. This means that the resistance is initiated by the population itself, or by the call of the authority. Lauterpacht includes under the term *levee en masse* the situation in which, “on the approach of the enemy, a belligerent calls the whole population of the country to arms”.<sup>82</sup> Such resistance directed or organized in advance is not included in this category.<sup>83</sup>

Third, for the civilian population who participate in the resistance to be a *levee en masse* and regarded as combatants and treated as prisoners of war if captured, they are required to carry arms openly and comply with the law and customs of war. However, since they rise to arms spontaneously, they are not required to organize themselves, nor to wear emblems.

#### **2.1.2.7. Members of the armed forces of the occupied country**

In the Second World War, when Germany occupied most of the continent of Europe. Members of the armed forces of the occupied States were captured and interned on account of security considerations during the occupation. They were released by the Germans after they were converted to civilian status (demobilized).<sup>84</sup> Therefore, they were subject to maltreatment and not considered as prisoners of war who are entitled to the benefit of the provisions of the 1929 Prisoners of War Convention, and if they

attempted to escape to join their government in exile and were caught, they were liable to severe punishment.

In the light of this experience, according to Article 4B (1) of the 1949 Geneva Convention, the status of prisoner of war is granted to members of the armed forces of the occupied country if they were interned by the occupying power while hostilities were proceeding outside the territory now occupied by it, who:

- 1- are originally released by the occupying power and then interned;
- 2- are captured after making an unsuccessful attempt to join the armed forces to which they belong;
- 3- fail to comply with an order made to them by the occupying power.<sup>85</sup>

#### **2.1.2.8. Members of Belligerents' Armed Forces in Neutral or Non-belligerent Countries**

Under international law, a neutral Power is not obligated to give asylum to troops who attempt to enter its territory to avoid capture by the enemy, or to individuals who escape from prisoner of war camps who seek refuge or try to get home through its territory. Under Article 11 of the Fifth Hague Convention of 1907<sup>86</sup>, the neutral Power is obliged to detain individuals who fall into the first category when it permits them to enter its territory, while with regard to the second category.<sup>87</sup> Article 13 of the same Convention, however, obliges the neutral Power to leave those who fall into the second categories at liberty and may allocate them a place of residence.<sup>88</sup>



According to Article 4B (2) of the 1949 Geneva Convention, another category of persons shall be entitled to the treatment of prisoners of war. This category includes persons belonging to one of the categories enumerated in Article 4 who are permitted to enter neutral territory or a non-belligerent country and whom these Powers are required to intern under international law. Such persons should be treated as prisoners of war under the 1949 Geneva Convention.

#### **2.1.2.9. Members of Medical Personnel and Chaplains**

Under the 1949 Geneva Convention, medical personnel and chaplains are specially privileged. In brief, it can be said that medical personnel belonging to the armed forces enjoy an international legal status as do chaplains who are in general not even members of the armed forces, which is an essential condition for non-combatants, are attached to the armed forces but not necessarily members of thereof.<sup>89</sup>

Members of medical staff who are engaged exclusively in the collection, transport and treatment of the wounded and sick, and also in the administration of mobile units, and chaplains, are entitled to be respected and protected at all times.<sup>90</sup> When they fall into the hands of the adversary, they are not to be considered as prisoners of war. At the same time, they are entitled to receive the benefit and protection, at least, from all the provisions of the present Convention.<sup>91</sup>

The Detaining Power is authorized under the 1949 Geneva Convention to retain medical personnel and chaplains only to the extent that their services are required for the care of prisoners of war of their own party to the conflict.<sup>92</sup> In addition, the Detaining Power is

obligated to offer the opportunity and the facilities to those retained personnel to perform their professional functions. However, if their assistance is no longer required, the Detaining Power has an obligation to release them and return them to their own country or army.<sup>93</sup>

With regard to individuals, who are trained in a medical profession, who fall into the hands of the adversary while serving with the medical service but not attached to it, they will, under the 1949 Geneva Convention, be required by the Detaining Power to perform their medical function on behalf of prisoners of war who depend on the same Power of origin. In such a case, they will continue to be prisoners of war. However, they will be entitled to the same treatment as retained medical personnel and will not be required to do any other work.<sup>94</sup>

## **2.2. Individuals who are not considered as Prisoners of War:**

The concept of prisoners of war is a limited one, and only certain categories of people are entitled to prisoners of war status and the protection it confers. There are certain categories of persons who, although they may be combatants and fall into the hands of the enemy, are expressly excluded from prisoners of war status and remain liable to punishment. These are the subject of this section.

### 2.2.1. Spies

It has been accepted that States cannot wage war without obtaining all sorts of information regarding their enemy, its forces, its intention and the nature of the adversary's territory. Such information can only be obtained only by employing spies. Therefore, spying is considered as an accepted element of warfare.

International law recognizes espionage. It is not contrary with its rules, nor it is a ground of complaint between States. Nevertheless, although it is lawful to employ spies to obtain information, this does not prevent their punishment. Therefore, individuals who are captured while procuring intelligence in other than an open manner are not protected by international law and are expressly excluded from the status of prisoner of war.<sup>95</sup>

The 1907 Hague Convention defines a spy as any person who, "when acting clandestinely or on false pretences, obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party".<sup>96</sup>

It is clear from this definition that the spy may or may not be a member of the armed forces; the distinguishing criterion is the clandestine nature of the activity. Thus, a member of the armed forces of an adversary of a party to the conflict who acquires or attempts to acquire military information in the uniform of his own armed forces is not considered as a spy and, if captured, will be treated as a prisoner of war.<sup>97</sup>



In addition, not wearing a uniform does not render an individual a spy, although, he has to convince the captor to the contrary.<sup>98</sup> The First Protocol made a distinction between a spy and a member of the armed forces who is a resident of territory occupied by the enemy, who acquires or attempts to acquire military information. Such a person will not be considered as a spy unless captured while actually engaging in espionage and employing false pretence or acting in a clandestine manner.<sup>99</sup> Furthermore, a member of the armed forces of a party to the conflict who actually engages in espionage and not resident of the territory under enemy occupation will not be treated as a spy if he is captured after he has rejoined the armed forces of the State on which he depends.<sup>100</sup> Finally, as mentioned above, under international law, espionage is a lawful activity. However, a spy is not protected under international law from punishment, and the usual punishment for spying is hanging or shooting; the only privilege the spy obtains under international law, is that he is entitled to a trial and cannot be executed summarily.<sup>101</sup>

Under Islamic law, in general, espionage is considered as a dishonourable act which Muslims should not perform. However, as the state of war is an abnormal state and it has its own rules, under Islamic law, spying is a legitimate implement of war, since the commander of Islamic army has to take all available means to obtain the necessary information about the enemy in order to devise an adequate strategy to gain victory.<sup>102</sup> This is supported by the practice of the Prophet (pbuh) as it is narrated that on the day of Badr and prior to the fight, the Prophet (pbuh) dispatched some of his companions to gather information about the Quraish. They came across two Quraish water carriers,

captured them and brought them before the Prophet (pbuh). They were interviewed by the Prophet, and from the information obtained He estimated the number of the Quraish Army as between nine hundred and a thousand, as they were consuming between nine and ten sheep every day.<sup>103</sup> An additional example is that prior to the battle of Hunan (630 A.D), the Prophet (pbuh) directed AbdulAllah Al-Islamy to slip among the enemy to gather all available information which might help the Prophet in his military operation.<sup>104</sup>

Conversely, there are many incidents where Muslims were exposed to attempts at espionage, such as, the case of Hatib Ibn Abe Baltah. Prior to the conquest of Makkah (630), while the Prophet was preparing his army to invade Makkah, Hatib dispatched a letter to the people of Makkah, warning them of the Prophet's intention to invade them.<sup>105</sup> Another incident was the case of the Hawazin spy who attempted to slip among the Muslims after the battle of Hawazin, to gather any helpful information and to ascertain the circumstances of the Muslim's army.<sup>106</sup>

The foregoing discussion shows the importance of espionage from the perspective of those who profit from it. however, espionage is dangerous and can effect serious damage on the party against whom it is used. Therefore, under Islamic law, one who spies or attempts to do so deserve a harsh punishment.

According to Islamic scholars, the punishment for spying<sup>107</sup> would differ depending on who committed it, since it could be performed by Muslims, non-Muslims who live under the Islamic State (*Dhimmis*)<sup>108</sup>, non-Muslims who enter the Islamic State with *Aman*

(safe-conduct) or enemy fighters.

Regarding the first category, if a Muslim is captured while spying on behalf of non-Muslims, Islamic scholars have different views concerning punishment. Some hold the view that he should be executed, while others argue that he should be punished but not executed, unless he repeats the offence, and finally, some hold the view that, in such a case he should not be killed but it is up to the head of the Islamic State to pick the appropriate punishment, such as physical torture, or imprisonment.<sup>109</sup>

To support their views, all these groups cite the case of Hatib, who acted as a spy and tried to send a letter to the people of Makkah informing them of some of the intentions of the Prophet (pbuh), even though he was a Muslim.

The holders of the first view argue that a Muslim spy should be killed. They argue that, it is understood from the tradition (*Hadith*) that the reason for not killing Hatib was not because he was a Muslim, but because he had participated in the battle of Badr, as the Prophet said, “Who knows, perhaps Allah has already looked at the Badr warriors and said, “Do whatever you like, for I have forgiven you”. Therefore, they infer, not killing the Muslim spy, is an exceptional rule for the fighters of Badr. Other Muslims should be killed if they spy on behalf of the enemy, since their action harms the Muslims and is worse than the enemy’s fighters.

The second group argues that in the case of Hatib he was not killed because it was the



first time he had acted as a spy. In addition, a person cannot be considered as a spy unless he makes espionage a habit and a career. In this case only, he should be killed. In other cases, he should be punished.

The third group argues that in the case of Hatib, if his offence had justified his killing, the Prophet (pbuh) would not have left him but killed him. The fact that he had participated in the battle of Badr would not prevent the punishment if he deserved it. Likewise if he deserved death as a murderer. In addition, they refer to the case of Forat Ibn Haeen, who was a spy for Abu Sufeyn. The Prophet ordered his killing. When he was captured he said, "I am a Muslim". Then they brought him in front of the Prophet (pbuh) and said, "He is claiming that he is a Muslim". The Prophet ordered his release.<sup>110</sup> They argue that this case indicates that it is not permissible to execute a Muslim for spying on behalf of the enemy, as the Prophet ordered Forat's release after hearing his claim to be a Muslim.

The foregoing arguments show that Islamic scholars agree that for Muslim to spy against other Muslims is considered as a major offence and deserves punishment. However, they disagree with regard to the appropriate punishment. Some hold that all spies should be executed, some make a distinction between those who commit espionage for first time and those who commit it as a job, and some believe that Muslim spies should not be killed. We believe that if the spy has no logical motive or accepted justification for his act and he commits it as a favour to the enemy, adhering to unbelievers, opposing the Muslims and loving the enemy and being faithful to them, then the head of the Islamic State should order his execution, since his act brings damage upon Muslims and the

damage must be removed. In addition, spying affects the interest of the Islamic Nation and could cause the killing of a large number of Muslims. However, if there was a logical motive or an accepted justification and the spy regretted his offence, then the head of the Islamic State could impose a lesser punishment, or might forgive him, as the Prophet (pbuh) pardoned Hatib for his offence.

On the subject of the second category, non-Muslims who live under the Islamic State (*dhimmis*), regarding their punishment if they spy against the Islamic State, there are three schools of thought among Islamic scholars. The first is that their contract has been broken and it is up to the head of the Islamic State to choose between executing or enslaving them. Holders of this view cite the case of Forat. To support their view they argue that he was a non-Muslim living in the Islamic State and considered a citizen of it. But when the Prophet knew that he was a spy for Abu Sufan, he commanded his killing as a spy. However, because he claimed he had ceased his offence and announced he was a Muslim, he was not killed. Since he was not killed because he was a Muslim, it is inferred that it is legitimate to kill a non-Muslim spy. In addition, they argue that it is a condition upon the *dhimmis* that they should not help or accommodate spies, and if they break the contract, it is legitimate to kill or enslave them.<sup>111</sup>

The second view is that a *dhimmis* spy should not be killed and his contract is not broken when he acts as spy unless there is an explicit statement in the contract to that effect. Those who hold this view argue that the fact that “not being as a spy” is not stated on the contract means that the contract remains valid and *dhimmis* will be protected.<sup>112</sup>



The third view is that a *dhimmis* spy who is spying for the enemy of the Muslims must not be killed, nor his contract broken. He must however, be punished severely. Proponents of this view argue that the *dhimmis*' being a spy does not remove his status as *dhimmis*. To support their view they cite the case of Hatib. They argue that even though Hatib was a Muslim and engaged in espionage, his offence did not stop him from being a Muslim, as Allah called him, "O ye who believe! Take not My enemies And yours as friends" (H. Q. S60. A1). Furthermore, they argue that acting in a way that harms Muslims is considered a kind of sin committed by the *dhimmis* which is not serious as he being an atheist, and if a contract with atheists can be upheld, it is even more likely to be upheld for a lesser offence.<sup>113</sup>

The foregoing discussion shows that Islamic scholars agree that in case of the *dhimmis* being a spy he should be punished. However they disagree regarding the punishment. I believe that, since the *dhimmis* is considered a citizen of the Islamic State, and espionage is a crime for which the perpetrator should be punished, regardless whether he is a Muslim or not, therefore, in case of his being a spy, the *dhimmis* should be punished according to Islamic law, and it is up to the head of the Islamic State to decide the appropriate punishment, depending on the interest of the Islamic nation.

The third category is the *Mustamin*, unbelievers who enter the Islamic State with an *Aman* (safe-conduct). Islamic scholars are divided into two views regarding the punishment of a *Mustamin* who is captured while engaged in spying.



The first view is that his *Aman* (safety) is broken and that the *Mustamin* in such case must be killed unless the head of the Islamic State decrees that he should be made a slave. The holders of this view argue that the safety contract by which the non-Muslim was authorized to enter the Islamic State was conditional on his not spying. However, if he engaged in espionage, then his safety contract would be broken. In addition, they argue that if espionage was not regarded as reason to break the safety contract, this would lead to the disparagement of Muslims.<sup>114</sup>

The second view is that a *Mustamin* spy should not be killed, nor is his safety contract broken. However, he should be imprisoned or punished severely. To support this view, scholars cite the case of Hatib Ibn Abe Baltah, since his offence did not prevent him from being a Muslim; equally, if the *Mustamin* commits the same offence it does not result in the breaking of his safety contract.<sup>115</sup>

The researcher believes that since the *Mustamin* is not a citizen of the Islamic State and he is allowed to enter it at a specific time for a specific purpose, on condition that he does not harm the citizens of the Islamic State or its interest, and since there is no particular punishment for the espionage, therefore, it is up to the head of the Islamic State to decide the appropriate punishment. This could mean ordering him to leave the Islamic State, imprisoning him, physical torture, coercion to reveal important information, or execution, depending on the situation.

The fourth category is the unbeliever combatant who is captured while acting as a spy. Islamic scholars agree that such spies should be killed. They support their view by referring to the case of the Hawazin spy, as the Prophet (pbuh) ordered his killing.<sup>116</sup>

### **2.2.2. Mercenaries and Citizens who ally themselves with the enemy (disloyal)**

Mercenaries and citizens who ally themselves with the enemy are identified as two distinct categories in international law. In Islamic law, however, there is no explicit discussion of either category. The same principles, however, are applicable to both, as will be seen. Therefore, to avoid repetition, it is convenient to combine these two categories under one heading. First, the provisions of international law will be discussed. Then, an attempt will be made to deduce the position of such persons in Islamic law.

There was no attempt to categorize the members of an armed force on the basis of their nationality or the motives which led them to join that force, whether it was ideological or mercenary, until the adoption of the First Protocol.<sup>117</sup>

According to Article 47 of the First Protocol, “a mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) Is not a member of the armed forces of a Party to the conflict; and
- (f) Has not been sent by a State which is not a Party to the conflict on official duty as a



member of its armed forces.”

These conditions are collective, which mean that all the conditions set out as stipulations must be met before a person can be regarded as mercenary. This makes the definition of mercenaries so narrow that few will fall within its scope. Consequently, in case any of these conditions is not satisfied, the captured person cannot be considered a mercenary within the meaning of the First Protocol.<sup>118</sup>

For instance, only those who have been recruited in another country to join military forces for ‘personal gain’ are be regarded as mercenaries, Not all foreigners serving in the armed forces of other countries are considered and treated as mercenaries as some serve with the approval of their home government, and some enter a particular fight for moral or ideological motives.<sup>119</sup>

According to Article 47<sup>120</sup> of the First Protocol, mercenaries do not have the right to be regarded as combatants and prisoners of war if captured. Nevertheless, they are not devoid of all protection. Because of the fact he is not a combatant, a mercenary is presumably a civilian and would be protected under the Fourth Geneva Convention to the degree that he is not regarded and tried as an unlawful combatant,<sup>121</sup> but he is still entitled to the minimum guarantees embodied in Article 75 of the First Protocol with regard to the treatment of persons who fall into the power of a party to the conflict.<sup>122</sup>

In general, the armed forces of the belligerent consist of its citizens or those of its allies. Any person falling within one of the categories enumerated in Article 4 of the 1949 Geneva Convention, who holds the nationality of the State they are fighting for or one of its allies, when they fall into the hands of the adversary, will be entitled to the status of prisoner of war. However, the question is, what is the position of the person who is a national of the Capturing Power, or one of its allies, captured while serving in the armed forces of the enemy?

Under international law, the parties to the conflict are not allowed to force enemy nationals to take part in the operations of war directed against their own State, even though they joined the army of the belligerent before the beginning of the war.<sup>123</sup> However, during the First and the Second World Wars, there were many cases in which prisoners of war were induced to agree, by encouragement, coercion or by other forced means, to renounce their right and serve in the armed forces of the Detaining Power.<sup>124</sup> Now this is considered a violation of Article 4A of the 1949 Geneva Convention, which states that, such persons are, upon falling into the power of the other side, prisoners of war. Furthermore, Article 5 provides that, the status of prisoners of war will continue “From the time they fall into the power of the enemy and until their final release and repatriation”; finally, Article 7, stipulates that, “prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention”.

According to Article 130 of the 1949 Geneva Convention, it is considered a grave breach of the Convention to compel a prisoner of war to serve in the forces of the hostile power.

It also prohibits the involuntary service by prisoners of war. Furthermore, Article 7, prohibits the voluntary service by a prisoner of war in the Army of the Detaining Power.<sup>125</sup>

Article 4 of the 1949 Geneva Convention enumerates the categories of persons who are entitled to the status of prisoners of war upon capture. However, there is no specific reference to the case of prisoners of the Detaining Power's own nationality, or of one of its allies. In addition, the 1949 Geneva Convention contains certain provisions which appear to be based on the assumption that prisoners of war are not nationals of the Detaining Power, and that the Detaining Power is not obliged to grant the status of prisoners of war to its own nationals.<sup>126</sup>

The provisions in the 1949 Geneva Convention led many writers to hold the view that the Detaining Power is not obliged to grant prisoners of war status or to the protection of international law, to its nationals who fall into its power while serving in the armed forces of the enemy. Lauterpacht, for example, states that, "The privileges of members of the armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former."<sup>127</sup> Without doubt, the individual concerned may be, and always, are treated as criminals and could be tried for treason according to the municipal law of the Detaining Power whose nationality they hold.

Under Islamic law, the army of the Islamic State should not include such individuals as mercenaries or coerced prisoners, since all the combatants in Islamic army should fight



for the purpose of Allah and to make his law supreme. The Prophet (pbuh) was asked who could be described as fighting for Allah's cause? He replied: "He who fights in order to make Allah's law supreme fights for Allah's cause".<sup>128</sup> This objective could not be served by these individuals. In addition, although there is a disagreement among Islamic scholars regarding to the employment of unbelievers<sup>129</sup>, the majority hold the view that it is not legitimate for Islamic State to include such individual in its armed forces.<sup>130</sup> This view is based on the incident which took place prior to the battle of Badr, where an unbeliever followed the Prophet (pbuh) and offered to join him in his battle. The companions of the Prophet felt happy, as that man was brave and had no fear. The Prophet (pbuh), however, rejected his offer and said, "We do not have recourse to non-believers",<sup>131</sup>

In addition, if the Islamic State signs a convention prohibiting the employment of enemy nationals in the armed forces and from forcing them to take part in the operations of war directly against their own State, the Islamic State must fulfil its obligation, even the enemy national converts to Islam. The case of Abu Jandal bin Suhail confirms this point of view. He was prevented from joining the Muslims and returned to the unbelievers, the Quraish, as one of the conditions of the Hudaibiya treaty (628 A.D).<sup>132</sup>

With regard to individuals who ally themselves with the enemy, similarly, under Islamic law, we find the case of Apostates or Renegades.<sup>133</sup> In the case of Apostates who desert the religion of Islam and fight the Islamic State, whether by constituting themselves as a group or by joining the unbelievers who are fighting Muslims, there is an agreement

among Islamic scholars that the Islamic authority should debate with them the beliefs that have caused their desertion, in order to counter their misconceptions and to encourage them to return to Islam; otherwise, the Islamic authority must fight them after a warning has been issued to them.<sup>134</sup>

In a war between the Islamic authority and Apostates, whether they are constituted as a group or are fighting alongside the unbelievers, when Apostates fall into the hands of the Islamic State, their treatment and status will differ from that of prisoners of war. Islamic scholars agree that Islam would be offered to such a person. He has either to return to Islam or be killed, and he must be given three days to choose between Islam and death.<sup>135</sup>

## **Conclusion**

This chapter has explored the definition of prisoners of war in Islamic and international law. In Islamic law, the definition is a simple one, that reflects the circumstances of the time when the law was revealed. It takes into account anyone who fights or who comes with the enemy. The word 'prisoners' is used to refer to all such people who fall into the hands of the enemy, irrespective of category.

In international law, the definition is more complex, and specific provision is made for categories of persons who are not mentioned in Islamic law, and in some cases, were not mentioned in international law prior to 1949 due to change in society and in the nature of

warfare. Crews and pilots of ships and aircraft are an obvious example.

There are some categories within the 1949 Geneva Convention provision, where a degree of conflict may exist with Islamic law. One such is persons who accompany the armed forces without actually being members thereof. In Islamic law, generally, civilians are protected, but if persons accompanying the armed forces actively assist the adversary by giving advice and encouragement, even if they do not actually fight, they would be treated as prisoners of war. The same is true of medical personnel and chaplains. In Islamic law, they could be treated as prisoners of war, on the ground that they may indirectly help the enemy to fight, whether by restoring a wounded combatant to fighting condition, or by exhortation and moral support. If they keep away from the fighting, however, they would be treated in the same way as any non-combatant.

The category of “inhabitants who take up arms ...” does not conflict with Islamic law. As noted earlier, non-combatant are protected in Islamic law, but persons who take up arms and join the fighting would be treated as enemy combatants, liable to capture in the same way as regular warriors and subject to the same possible fates (these will be discussed in the next chapter).

In general, then, it can be said that the definitions of prisoners of war under the two legal systems, despite the simplicity of one and the complexity of the other, are not incompatible. Both systems, broadly, make provisions for persons who fall into the hands of the enemy, as members of armed forces, or persons accompanying and assisting such



forces. There seems to be no major conflict between the two laws.

The same is true of the “negative definition” whereby certain categories are excluded from prisoners of war status and do not have the protection that such status affords. Such persons include spies, mercenaries, and traitors. Both international law and Islamic Law are consistent in regarding spies and traitors as outside the category of prisoners of war, though they differ in the punishment options available. Theoretically, in the case of spies, torture would be an option in Islamic law, at the decision of the head of the Islamic State and depending on the circumstances of the case, but such an option would not be permissible under international humanitarian law. Execution, however, appears to be a possibility in both systems.

As regards traitors, again, executing is a possibility in both systems. However, in Islamic law, alliance with the enemy (unbelievers) is not merely a political or pragmatic choice, but involves apostasy. Since war in Islamic law is intended to serve Islam, the preferred option is for the apostate to be persuaded to return to Islam. Executing is a last resort if he refuses to recant his apostasy. An area where there may be a conflict between the two systems is with regard to the capture of mercenaries. In international law, mercenaries are not accorded prisoners of war status, although they would still be entitled to basic humanitarian protection. In Islamic law, mercenaries are not accepted among the combatants of the Islamic State, because such persons would not be fighting for the exaltation of Islam. If Muslims captured members of an opposing army (unbelievers) who were serving with that army as mercenaries, then no distinction would be drawn

based on the motivation for their involvement. A mercenary falling into the hands of a Muslims Power would have the same rights as other prisoners-rights which will be discussed in Chapter Three.

## **Endnotes to Chapter Two**

<sup>1</sup> Ministry of Awqaf and Islamic Affairs, Encyclopaedia of Figh, Kuwait, Ministry of Awqaf and Islamic Affairs, no date, vol 4, P195. See also, Ibn Manduor, op cit, Asra material.

<sup>2</sup> Abu Dawod, op cit, vol II, p252.

<sup>3</sup> Al-Sarakhasi, Muhammad Ibn Ahmad ibn Abe Sahil, Al-Mabsut, Cairo, Mutbat al-Saadah, 1345 A.H, vol 10, p63.

<sup>4</sup> Al- Khrashi, Mohammed Ibn AbdulAllah, Sharh al- Khrashi Ali-Mukhtasar Khalil, Beirut, Der al-Fikr, no date, vol 13, p121.

<sup>5</sup> Al-Shafai, Alum, op cit, vol 4, p275.

<sup>6</sup> Ibn Qudamah, Muafqal-Deenal AbdulAllah, al-Muqni, Beirut, Dar Ihya al-Turath al-Arabi, no date, vol 8, p484.

<sup>7</sup> Al-Mawardi, op cit, p131.

<sup>8</sup> Abu Yala, op cit, p125.

<sup>9</sup> Al-Zuhili, Athar al-Harb, op cit, p417. See also, Amer, Abdullateef, Ahkam al-Asra wal-Sabaia fil-Horob al-Islameh, Cairo and Beirut, Dar al-Kitab al-Misri, and Dar al-Kitab al-Lubnani, 1406 A.H/ 1986 A.D, p290.

<sup>10</sup> Amer, p80. For more detalis see above 2.6.

<sup>11</sup> Ibn Hisham, Abdul-Malik Ibn Ayyup, al-Sira al-Nabawia, Cairo, Matbat Mutaafa al-Halabi, 1357 A.H/ 1955 A.D, vol I, p601.

<sup>12</sup> Haykal, op cit, vol 3, p1556.

<sup>13</sup> Amer, op cit, p83.

<sup>14</sup> Malik, Malik Ibn Anas, al-Mudauanah, Beirut, Dar al-Kutub al-Elmiah, no date, vol I, p 501.

<sup>15</sup> Ibn Taymiya, Ahmad, al-Siyasa al-Shariyya fi Aslah al-Raei wal-Rach, Damascus, Dar al- Bayin, no date, p73.

<sup>16</sup> Haykal, op cit, vol2, p1382.

<sup>17</sup> Al-Sanani, Ahmad Ibn al-Qassm, al-Taj al-Mudahab le-Ahkam al-Madahab, Yaman, Maktabat al-Yaman, 1366 A.H/1947 A.D, vol 4, p459. See also, Amer, op cit, p82.

<sup>18</sup> Abu Zahra, al-Alaqat, op cit, p120.

<sup>19</sup> Malik, al-Muwta, op cit, vol2, p448.

<sup>20</sup> Khadduri, War and Peace, op cit, p165.



<sup>21</sup> Al-Sarakhasi, al-Siyar, op cit, vol. 2, no date, pp 409-411.

<sup>22</sup> Ibad, p551. See also, Amer, op cit, p82.

<sup>23</sup> Haykal, op cit, vol2, p1433.

<sup>24</sup> M. H. F. Clarke, T. Glynn, A. P. V. Rogers, Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention, Edited Micheal A. Meyer, University of Hull, the Brynomor Jones Library, p107. See also, McCoubrey, Hilaire, International Humanitarian Law: ( the Regulation of Armed Conflict), Dartmouth Publishing Company Limited Press, 1993, p80.

<sup>25</sup> L. C. Green, op cit, p102.

<sup>26</sup> Ibad, p99.

<sup>27</sup> (Official Document), Project of an International Declaration Concerning the Laws and Customs of Was, Adopted by the Conference of Brussels, August 27, 1874, 1-II, A.J.I.L., 1907, p. 96. (Hereinafter cited as The Brussels Conference of 1874).

<sup>28</sup> Rosas, Allan, The Legal Status of Prisoners of War, A Study in International Humanitarian Law Applicable in Armed Conflict, Helsinki, Suomalainen Tiedeakatemia, 1976, p296.

<sup>29</sup> Article 9 of The Brussels Conference of 1874.

<sup>30</sup> Article 10 of The Brussels Conference of 1874.

<sup>31</sup> Hague Convention No. II With Respect to the Law and Customs of War (with Annexed Regulation), July 29, 1899, [UKTS 1901 No. 11 (Cd. 800)], (Hereinafter cited as The 1899 Hague Conference).

<sup>32</sup> (Official Document), Hague Convention No. IV Respecting the Law and Customs of War on Land ( with Annexed Regulations), October 18, 1907, II A.J.I.L., 1908, p.90. (Hereinafter cited as The 1907 Hague Regulation).

<sup>33</sup> Article 2 of the 1907 Hague Regulation reads as follows, "The inhabitants of a territory not under occupation, who, on the approach of the enemy, spontaneously take up arms to resist the invading troop without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war".

<sup>34</sup> Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, [118, LNTS, 343], (Hereinafter cited as The 1929 Geneva Convention).

<sup>35</sup> Article 1 of the 1929 Geneva Convention reads as follows, "The present Convention shall apply without prejudice to the stipulations of Part VII: (1) To all persons referred to in Articles 1, 2 and 3 of the Regulations annexed to the Hague Convention (IV) of 18 October 1907, concerning the Laws and Customs of War on Land, who are captured by the enemy. (2) To all persons belonging to the armed forces of belligerents who are captured by the enemy in the course of operations of maritime or aerial war".

<sup>36</sup> Rosas, Allan, op cit, p 297.

<sup>37</sup> M. H. F. Clarke, T. Glynn, A. P. V. Rogers, op cit, p115.

<sup>38</sup> Levie, Howard S., Prisoner of War in International Conflict, Washington, Newport, R.I., Naval , Naval War Collage, 1977, p34.

<sup>39</sup> Aldrich, George H., The Law of War on Land, A.J.I.L., V 94, I, Jan 2000, pp 42-43. See also, De Lupis,

Ingrid Detter, op cit, p107.

<sup>40</sup> Article 4 of the 1949 Geneva Convention reads, "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. Persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention".

<sup>41</sup> McCoubrey, op cit, p80. See also, Rosas, Allan, p329.

<sup>42</sup> Article 77 of the First Protocol. See McCoubrey, op cit, p85.

<sup>43</sup> Levie, Howard S., op cit, p36.

<sup>44</sup> Rosas, Allan, op cit, p328.

<sup>45</sup> De Lupis, op cit, p107.

<sup>46</sup> Green, op cit, p190.

<sup>47</sup> Levie, Howard S., op cit, p37.

<sup>48</sup> Article 16 of the 1949 Geneva Convention reads as follows, "Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria".(Emphasis added).

<sup>49</sup> Green, op cit, p191.

<sup>50</sup> This has been evident at least to the 1907 Hague Convention, Article 3 reads, "The armed forces of the belligerents may consist of combatants and non-combatants. In case of capture by the enemy, both have the right to be treated as prisoners of war".

<sup>51</sup> Article 33 of the 1949 Geneva Convention. See M. H. F. Clarke, T. Glynn, A. P. V. Rogers, p110.

<sup>52</sup> Rosas, Allan, p399. See also, Levie, Howard S., p39.

<sup>53</sup> For instance, the Soviet Government claimed the resistance movement operating behind German lines; the United States claimed the resistance operating against Japan in the Philippines. See, Levie, Howard S., op cit, p40. See also, Aldrich, George H., op cit, pp42-44. See also, Rowe, Peter, Defence, the Legal Implications, Military Law and the Law of War, London, Brassey's Defence Publishers, p159.

<sup>54</sup> For more details in these conditions, see, Rosas, Allan, op cit, p329. See also, Levie, Howard S., op cit, p44.

<sup>55</sup> Rowe, Peter, op cit, p159. See also, De Lupis, op cit, p111.

<sup>56</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (Hereinafter cited as the First Protocol 1977).

<sup>57</sup> Article 1, paragraph 4 of the First Protocol 1977.

<sup>58</sup> Green, op cit, p107.

<sup>59</sup> Aldrich, George H., op cit, p43.

<sup>60</sup> Article 43, paragraph 1.

<sup>61</sup> Article 44 (3).

<sup>62</sup> Article 44 (4).

<sup>63</sup> International Committee of the Red Cross. (hereinafter cited as ICRC).

<sup>64</sup> Rosas, Allan, op cit, p252.

<sup>65</sup> A suggestion has been made that an organization must be established from a third State. See Levie, Howard S., op cit, p60, footnote 222.

<sup>66</sup> Article 4, A (4).



<sup>67</sup> Rosas, Allan, op cit, p303. See also, Levie, Howard S., op cit, p61.

<sup>68</sup> According to Green “they must be distinguished from journalist engaged on dangerous professional missions in areas of armed forces” who are covered by the First Protocol, Article 79, See Green. Op cit, p106, footnote32.

<sup>69</sup> For example, Organisation Todt, in France working for Germany.

<sup>70</sup> Article 13 of the Hague Convention 1907, reads, “Provided they are *in possession of a certificate* from the military authorities of the army which they were accompanying”. Article 81 of the 1929 Geneva Convention reads, “Provided they are *in possession of an authorization* from the military authorities of the armed forces which they were following”. (Emphasis added).

<sup>71</sup> Wolff Heintschel von Heinegg, “the Law of Armed Conflict at Sea”, in Fleck, Dieter (Ed)., *The Handbook of Humanitarian Law of War*, Oxford, Oxford University Press, 1995, pp405-407. According to the German view, merchant ships are all ships which are owned privately, not by the State, See El-Far, A., op cit, at footnote 45.

<sup>72</sup> Lauterpacht - Oppenheim, op cit, vol II, p467.

<sup>73</sup> Ibad, p406.

<sup>74</sup> Hague Convention No .XI Relative to Certain Restrictions With Regard to the Exercise of the Right of Capture in Naval War.

<sup>75</sup> Levie, Howard S., op cit, p93. See also, Rosas, Allan, op cit, p303.

<sup>76</sup> De Lupis, op cit, p111.

<sup>77</sup> Levie, Howard S., op cit, p64.

<sup>78</sup> Article 10 of the Brussels Conference of the 1874 reads, “The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war”.

<sup>79</sup> A territory is considered not occupied if it is not yet under the control of the enemy.

<sup>80</sup> Green, op cit, p104.

<sup>81</sup> Kunt Ipsen, “Combatant and Non-combatant”, In Dieter Fleck (Ed)., *The Handbook of Humanitarian Law of War*, Oxford, Oxford University Press, 1995, pp 65-79. See also, Levie, Howard S., op cit, p64.

<sup>82</sup> Lauterpacht - Oppenheim, op cit, vol II, p257.

<sup>83</sup> Kunt Ipsen, op cit, p79.

<sup>84</sup> During the Second World War, the armed forces of Belgium, Holland and France were demobilized then later were interned by Germany for reasons of general security, or because they had attempted to rejoin their forces outside occupied territory. See Rosas, Allan, op cit, p 301.

<sup>85</sup> Lauterpacht - Oppenheim, op cit, vol II, p347, footnote 1. See also, Levie, Howard S., op cit, pp 66-67. As prisoners of war, if they attempted to escape and were caught, under the 1929 Geneva Convention, they would be subject to a disciplinary punishment only.

<sup>86</sup> Hague Convention No. V Respecting the Right and Duties of Neutral Power and Persons in Case of War on Land, 18 Oct, 1907.(hereinafter cited as the Fifth Hague Convention 1907 )

<sup>87</sup> Art. 11 reads, "A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war".

<sup>88</sup> Art 13 reads, "A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence". See Levie, Howard S., op cit, p68.

<sup>89</sup> Kunt Ipsen, op cit, pp 313-314.

<sup>90</sup> Article 24, First Geneva Convention.

<sup>91</sup> First paragraph of Article 33 of the 1949 Geneva Convention.

<sup>92</sup> Article 28 of the First Convention. However, the 1929 Geneva Convention provides that medical personnel must not be detained by the belligerent when they fall into the hands of the adversary.

<sup>93</sup> Article 33, of the 1949 Geneva Convention. Article 30 of the First Convention.

<sup>94</sup> Article 32 of the 1949 Geneva Convention.

<sup>95</sup> Lauterpacht - Oppenheim, op cit, vol II, p422. See also, McCoubrey, op cit, p86.

<sup>96</sup> Article 29 first paragraph.

<sup>97</sup> Article 29, Para 2, and Article 46, Para 2, of the First Protocol.

<sup>98</sup> McCoubrey, op cit, p86.

<sup>99</sup> Article 46, paragraph 3, of the First Protocol.

<sup>100</sup> Article 31, Hague Convention. Article 46, paragraph 4, of the First protocol.

<sup>101</sup> Article 30 Hague Convention.

<sup>102</sup> Abdul Hameed, Ibrahim, Mujaz al-Qanoon al-Dawaly fil-Islam Muqaran bel-Qanoon al-Dawaly al-Hadeeth, Cairo, no publisher, no date, p 46.

<sup>103</sup> Ibn Hisham, op cit, vol 2, p269.

<sup>104</sup> Ibid, vol 4, p82.

<sup>105</sup> Al-Bukhari, op cit, H. No.2785. See Muslim, op cit, H. No. 4550. The full incident is, it has been narrated on the authority of Ali siad, "Allah's Apostle sent me, Az-Zubair and Al-Miqdad somewhere saying, Proceed till you reach Rawdat Khakh (a place between Makkah and Al-Madina). There you will find a lady with a letter. Take the letter from her. "So, we set out and our horses ran at full pace till we got to Ar-Rawda where we found the lady and said (to her). "Take out the letter." She replied, "I have no letter with me." We said, "Either you take out the letter or else we will take off your clothes." So, she took it out of her braid. We brought the letter to Allah's Apostle and it contained a statement from Hatib bin Abe Baltah to some of the Makkah pagans informing them of some of the intentions of Allah's Apostle. Then Allah's Apostle said, "O Hatib! What is this?" Hatib replied, "O Allah's Apostle! Don't hasten to give your

judgment about me. I was a man closely connected with the Quraish, but I did not belong to this tribe, while the other emigrants with you, had their relatives in Makkah who would protect their dependents and property. So, I wanted to recompense for my lacking blood relation to them by doing them a favour so that they might protect my dependents. I did this neither because of disbelief nor apostasy nor out of preferring disbelief to Islam." Allah's Apostle, said, "Hatib has told you the truth." Omar said, "O Allah's Apostle! Allow me to chop off the head of this hypocrite." Allah's Apostle said, "Hatib participated in the battle of Badr, and who knows, perhaps Allah has already looked at the Badr warriors and said, 'Do whatever you like, for I have forgiven you.'"

<sup>106</sup> It has been reported by Salama b. al-Akwa': We fought the Battle of Hawazin along with the Messenger of Allah (pbuh). (One day) when we were having our breakfast with the Messenger of Allah (pbuh), a man came riding a red camel. He made it kneel down, extracted a strip of leather from its girth and tethered the camel with it. Then he began to take food with the people and look (curiously around). We were in a poor condition as some of us were on foot (being without any riding animals). All of a sudden, he left us hurriedly, came to his camel, untethered it, made it kneel down, mounted it and urged the beast which ran off with him. A man on a brown she-camel chased him (taking him for a spy). Salama (the narrator) said: I followed on foot. I ran on until I was near the thigh of the she-camel. I advanced further until I was near the haunches of the camel. I advanced still further until I caught hold of the nosestring of the camel. I made it kneel down. As soon as it placed its knee on the ground, I drew my sword and struck at the head of the rider, who fell down. I brought the camel driving it along with the man's baggage and weapons.

<sup>107</sup> Under Islamic law there is no distinction made between spies of war or spies of peace, nor between male or female spies.

<sup>108</sup> *Dhimmis*, are non-Muslims who live in the Islamic State and under its control as a result of a contract between them and the Islamic State. This contract is permanent and its valid for the contractor and his issue (children), and they become citizens of the Islamic State, with rights and duties.

<sup>109</sup> Al-Sarakhasi, al-Siar, op cit, vol 5, p2040. See also, Al-Khrashi, op cit, vol3, p 119. See also, al-Shafai, Alum, op cit, vol 4, p264. See also, Ibn al- Qayyim al-Jawzeh, Mohammad Ibn Abe Baker al-Zarai, Zad al-Maead fi Hadi Khair al-Ebad, Beirut, Dar Ibn Hazeem, AH 1420, AD1999, p530. See also, al-Qurtubi, op cit, vol 18, p53. See also, Khadduri, War and Peace, op cit, p107, See also, Hamidullah, Muhammad, Muslim Conduct of State, Lahore, Ashraf Printing Press, Seventh Edition, 1977 A.D, p233.

<sup>110</sup> Ahmad Ibn Hanbal, al-Musnad, H. No. 18197. See also, Abu Dawwd, H. No. 2280. See also, Ibn al-Arabi, Abo Bakr Muhammed Ibn Abdul Allah, Ihkam al-Quran, Cairo, Dar al-Kutub al-Almech , 1367 A.D/ 1957 A.D, vol4. p 192.

<sup>111</sup> Ibn Qudamah, al-Muqni , op cit, vol 7,p282. See also, Muslim, op cit, vol 7, p347. Khadduri, War and Peace, p166.

<sup>112</sup> Al-Shwkani, op cit, vol8, p11. See also, Hakal, op cit, vol2, p1286. Se also, Hamidullah, op cit, p234.

<sup>113</sup> Al-Shafai, Alum, op cit, vol4, p200. See also, al-Kasani, op cit, vol7, p113. .See also, al-Nawawi, Muhee al-Dean Abo Zakara Yaha Ibn Sharaf, Sharah al-Nawawi Ala-Sahih Muslim, Cairo, Esa al-Halabi, no date, vol 7, p347.

<sup>114</sup> Ibn al-Qaeem, vol2, p809. See also, Abe Yala, op cit, p161. See also, Khrashi, op cit, vol 13, p120.

<sup>115</sup> Al-Sarakhasi, op cit, vol1, p306. See also, al-Shafai, Alum, op cit, vol 4, p200.

<sup>116</sup> Abe Yousuf, al-Khraj, op cit, p206. See also, al-Qurtubi, op cit, vol 18, p53. See also, Al-Shwkani, op cit, vol 8, p10. See also, Khrashi, op cit, vol 13, p120.

<sup>117</sup> Green, op cit, p113.



<sup>118</sup> McCoubrey, H, op cit, p87.

<sup>119</sup> De Lupis, op cit, p118.

<sup>120</sup> First paragraph.

<sup>121</sup> Green, op cit, p112.

<sup>122</sup> Article 75, first paragraph reads, “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons”.

<sup>123</sup> Last paragraph of Article 23, of the 1907 Hague Regulation.

<sup>124</sup> During the World Wars, I and II, defectors were permitted to give up their status as prisoners of war, and to join the armed forces of the Detaining Power.

<sup>125</sup> Levie, Howard S., op cit, p79. See also, Rosas, Allan, op cit, p289.

<sup>126</sup> Article 87, paragraph 2, stated, “the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance”. See also, Article 100, paragraph 3.

<sup>127</sup> Lauterpacht - Oppenheim, op cit, vol II, op cit, p268.

<sup>128</sup> Al-Bukhari, op cit, vol 1, No. 222. see also, Muslem, op cit, vol 3, No. 1513.

<sup>129</sup> For more details on the employment of unbelievers see, 3.1.5.1.

<sup>130</sup> Malik, al-Mudauanah, op cit, vil 3, p 40. see also, Ibn Qudamah, al-Muqni , op cit, vol 10, p 456. see also, Al-Shwkani, op cit, vol 8, p45.

<sup>131</sup> Muslim, vol 3, p1450. See also, Ahmad, vol 6, p148.

<sup>132</sup> The full story is, Narrated `Urwa bin Az-Zubair: That he heard Marwan bin Al-Hakam and Al-Miswar bin Makhrama relating one of the events that happened to Allah's Apostle in the `Umra of Al-Hudaibiya. They said, "When Allah's Apostle concluded the truce with Suhail bin `Amr on the day of Al-Hudaibiya, one of the conditions which Suhail bin `Amr stipulated, was his saying (to the Prophet), "If anyone from us (i.e. infidels) ever comes to you, though he has embraced your religion, you should return him to us, and should not interfere between us and him." Suhail refused to conclude the truce with Allah's Apostle except on this condition. The believers disliked this condition and got disgusted with it and argued about it. But when Suhail refused to conclude the truce with Allah's Apostle except on that condition, Allah's Apostle concluded it. Accordingly, Allah's Apostle then returned Abu Jandal bin Suhail to his father, Suhail bin Amr, and returned every man coming to him from them during that period even if he was a Muslim. See Al-Bukhari, op cit, H. No. 2512. See also, Muslim, op cit, H. No. 3337.

<sup>133</sup> Apostates or Renegades are those who decide to leave the religion of Islam. Islamic agree that the apostate is liable to capital punishment, they based their view on the saying of the Prophet (pbuh), “He who changes his religion must be killed”. Al-Bukhari, op cit, H. No 6411.

<sup>134</sup> Amer, op cit, p129.

<sup>135</sup> Ibn Qudamah, al-Muqni, op cit, vol 8, p124, see also, al-Kasani, op cit, vol7, p134, see also, Amer, op cit, 130.

## **Chapter Three:**

### **The System of Capture**

#### **Introduction**

Both Islamic Law and international law contain rules regarding the treatment of prisoners of war, their rights, and responsibilities of their captors towards them, from the moment of capture onwards. This chapter examines these rules. It is divided into two main sections. The first contains aspects of the taking, guarding and treatment of prisoners of war from the start of capture. The second examines specific rights which are provided for prisoners of war. Each of the aspects considered is examined first from an Islamic Law perspective, then in relation to international law. Comparison between the two systems are made, and conclusions drawn, in the last section.

#### **3.1. Prisoners of war inside the camps**

In this section, consideration is given to the event of capture with which prisoners of war status begins, what authority the captor has over the captive, and the arrangement for detaining and securing the prisoners, issues related to the treatment of prisoners of war inside prison camps, including the use of their labour by the Detaining Power, and the financial status of prisoners of war are discussed.

### **3.1.1. The start of capture**

Prisoner of war status begins from the moment of capture. Capture may arise from the forcible overpowering of an enemy combatant, or through his voluntary surrender. This section examines the circumstances of capture from the perspective of each legal system in turn.

#### **3.1.1.1. In Islamic Law**

The capture of a fighter is considered as a sort of surrender and his falling into the hands of the adversary constitutes a grave danger to the security of his own nation, as the enemy will usually take every measure possible to obtain information from the prisoner.

From this perspective, Islamic scholars discuss the subject of the capitulation of Muslim combatants to capture in cases where they are attacked by the enemy and they know that there is no way to survive except by surrender; should they fight to the death or should they capitulate?<sup>1</sup>

Before we point out the opinion of Islamic scholars regarding this matter, we shall cite the tradition, which is considered as the source of this case. It is narrated that a group of people came to the Prophet (pbuh), after the battle of Uhud (625 A.D), and said, “We have a bent for Islam so send with us some of your companions to teach us the *Quran* and the instruction of Islam.” Then the Prophet selected ten of his companions to go with them. When they were on the way, the group of people betrayed them and gathered the people against them. The companions of the Prophet got ready to fight, but the group said, “We are not going to kill you, but we would like to obtain funds from the people of Makkah if we



hand you to them". Some of the companions refused to surrender and chose to fight rather than to submit, and were eventually killed, while others agreed to surrender, and were sold to the people of Makkah.<sup>2</sup>

In this incident, the Prophet (pbuh) did not condemn either those who surrendered or those who did not, which means that both behaviours are permitted.<sup>3</sup>

Al-Hanafi scholars hold the view that Muslim fighters (*Mojahed*) should not capitulate unless in cases of necessity, while Al-Maliki scholars say it is acceptable for Muslim fighters to surrender. Shafi said Muslim fighters have the right to choose between capitulation and fighting to the death.<sup>4</sup> The Hanbali say that if a Muslim fighter fears falling into the hands of the enemy, he should preferably fight until he is killed and not capitulate, as he will thereby earn an exalted reward; however, it is permitted for him to surrender.<sup>5</sup>

These are the views of the Islamic scholars on the subject of the capitulation of Muslim fighters. The researcher believes that when a Muslim fighter faces such circumstances and cannot carry on fighting, then he should surrender; otherwise, he is exposing himself to death, which is forbidden in Islam. Allah says, "Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful!" (H. Q. S3. A29). This is especially so at the present time, as there is a convention, to which most of the members of the world community of nations have subscribed, whereby a prisoner will be protected from any threat to his life. However, if he knows that he will be killed in either case, whether he surrenders or continues fighting, then he should carry on.

According to Islamic Law, the status of prisoner of war comes into existence as soon as the warrior falls into the hands of the adversary, whether he surrendered or was taken in the battle, and his status is changed from a belligerent, who participates in the defence of his beliefs and fights his enemy, to a disarmed captive who is treated as a prisoner of war, not as a fighter.<sup>6</sup>

The first action, which will be taken in respect of the captive, is to remove from him any weapons, which could assist him in violence or escape.<sup>7</sup> Regarding other personal possessions, the matter is not so simple. Muslim scholars have discussed the matter of property of prisoners of war. On the one hand, they agree that the falling of a combatant into capture results in the loss of his right of possession; in view of the fact that he cannot act for himself, he cannot own anything. On the other hand, they disagree on the fate of these possessions. There are two views. One is that all possessions found on captives become the property of the Islamic State. The second view is that anything found on the prisoner will go to the combatant who captures him.<sup>8</sup>

Amer, commenting on this matter, said, "These previous rules which dealt with the possessions of prisoners of war are rules of jurisprudence that are changeable with the change of circumstances, not legitimate law supported by evidence which cannot be modified. It seems that the motive of Islamic scholars in holding that view was to apply what was already established in war at that time, among some nations, as they treated the defeated and his wealth in the same way".<sup>9</sup>

Hamidullah mentioned another view on the subject, according to whether the captives surrender voluntarily after obtaining an agreement on their safety and that of their money

(*Aman*), or whether they were captured after the victory of the Muslims. In the first case it is forbidden for Muslims to take anything from them, while in the second case, it is up the head of the Islamic State to make a decision on it.<sup>10</sup>

In the combat zone and before the transferring of prisoners of war to *Dar Al-Islam*, Muslim commanders have certain duties towards captives. First of all, Muslims have to treat the captives well and with kindness. They have to provide them with all their necessary needs, such as food and drink<sup>11</sup>. Allah said, “And they feed, for the love Of Allah, the indigent, the orphan, and the captive, (Saying), “We feed you For the sake of Allah alone: No reward do we desire from you, nor thanks. We only fear a Day of frowning and distress from the side of our Lord” (H. Q. S76. A8, 9 and 10).

In addition, it is forbidden under Islamic Law to torture prisoners of war by exposing them to hunger and thirst. Ibn Al-Humam stated, “It is not permitted to kill prisoners of war by hunger. if Muslims have no option because of shortage of food, then they have to release them”.<sup>12</sup>

Secondly, Muslim commanders must not expose the captives to the heat of the sun or to the cold. Captives have the right to be provided with shelter. This is shown by the case of Banu Quraiza, when they were detained and facing the high temperature of the summer: “the Prophet (pbuh) ordered his companions not to expose them to the heat”.<sup>13</sup>

Then, prisoners must be transferred to *Dar al-Islam*, and the Islamic commander should provide them with means of transportation for that purpose. It has been narrated that the



Muslims, on the day of Badr, when they were returning to *Dar al-Islam*, let the captives ride while they walked.<sup>14</sup>

If a captive refuses to comply with the order of the Muslim commander to be transferred to *Dar al-Islam* and attempts to escape, and the commander cannot force him to comply, then Islamic scholars agree that it is the right of the commander to kill him.<sup>15</sup>

However, if the Islamic commander cannot find transport to transfer them to *Dar al-Islam* then prisoners must walk, but if they are unable to walk and no one can carry them, then the Islamic scholars have different views. The first view<sup>16</sup> is that they must be killed, on the basis that if they are allowed to go free, they may return to their people and support them and could fight the Muslims again. The second view is that if the Islamic commander cannot transfer the captives and the prisoners are unable to walk to *Dar al-Islam*, then they should not be killed, and must be set free, as the commander does not know what the decision of head of the Islamic State is going to be. The preferred view is that it is not legitimate for the commander to kill prisoners of war in such circumstances, as execution is the extreme punishment for prisoners of war and needs careful consideration before applying it, and that is why it is the head of the Islamic State's decision.<sup>17</sup>

### **3.1.1.2. In International Law**

Similarly, in international law, if after a sudden attack, an enemy unit is surrounded and forced to admit defeat and surrender, the patrol has achieved its operation and returns to its

camp with the capture enemy combatants. These and many other events result in the transformation of the status of armed combatants to disarmed captives.<sup>18</sup>

The status of prisoner of war will come into being as soon as the combatant falls into the hands of the adversary. Article 5, first paragraph of the Geneva Convention 1949<sup>19</sup> provides that the Convention shall apply to prisoners from the moment they fall into the hands of the enemy. In other words, the status of captives will change from armed combatants to prisoners of war immediately, without need for any official action or decision, and they will be entitled to the full protection and maintain of the Convention.

Under the Geneva Convention 1949, the parties to the conflict are required to remove the captives from the combat zone to camps in the rear zone, as soon as possible, for the purpose of their protection.<sup>20</sup> Thus, it is considered as a violation of the Convention to hold captives in the battlefield, the combat zone, where they may be exposed to attack, or to use them as a shield against a military action.<sup>21</sup>

Since there may be among the new captives wounded or sick people whose health may be affected by the removal and whose evacuation would be more dangerous than to keep them in the combat zone, they are exempted from immediate removal from the combat zone; the capturing unit is authorised to keep this kind of captive in the battlefield.<sup>22</sup> Moreover, new captives who are wounded or sick will probably receive better medical service in the combat zone, whereas delay may lead to their death. Many modern armies have medical units which work close to the front-line, every day carrying out emergency operations on the seriously injured, and many injured enemy will receive the same type of emergency

care as that side's own personnel and will only be evacuated thereafter, "Unfortunately, this humanitarian procedure is far from being universally followed".<sup>23</sup>

Regarding the method by which such evacuation is to be carried out, it is required that it will at all times be effected humanely and under similar conditions to those employed in changes of station for forces of the Detaining Power.<sup>24</sup> In addition, during the process of evacuation, the Detaining Power is obliged to provide the new captives with a sufficient amount of food, potable water, clothing and medical attention, and shall take all needed safety measures to guarantee their safety, and to establish a list of prisoners of war who are evacuated, as soon as possible.<sup>25</sup>

With regard to the property of prisoners of war, the Geneva Convention 1949 conserves the personal possessions of prisoners of war, in addition to certain types of tools of a military nature. The first paragraph of Article 18 prohibits the confiscation of all personal property and certain types of military equipment (protective devices), which were with the prisoners of war at the time of capture. Other things like weapons or other effects, which may facilitate escape, and military documents, are exempted from this provision.

Under the Convention, the Detaining Power is not allowed to seize from prisoners of war any articles used for personal protection, such as their metal helmets, gas masks and the like, and articles used for clothing and feeding of the prisoner. These shall remain in their possession, even though these articles were the property of their government.<sup>26</sup>



Prisoners of war have the right to retain any identification documents which were supplied by the Power on which they depend, and in case they have no identity card, the Detaining Power shall provide them with such documents.<sup>27</sup>

In addition, the Geneva Convention divides the personal articles and effects which may be found with prisoners of war, regarding to the permissibility of impounding, into two categories, depending on the recognition of the security of the Detaining Power. The first category includes cash and items of monetary value. These may be taken away from prisoners of war after an officer's order. A record of the amount and the owner must be established in a special register, a receipt given and the amount taken credited to the prisoner's account. The second category includes articles which have personal or sentimental value. They may not be impounded from prisoners of war.<sup>28</sup>

Finally, all items which are impounded from prisoners of war, such as money or articles, will be placed in safekeeping for ultimate return to the prisoners at the end of their captivity.<sup>29</sup>

### **3.1.2. Coercing prisoners of war to reveal military secrets**

A prisoner of war feels love towards his country and nation, and concern for their interests over others and it is unlikely that he would willingly breach them or disclose their secrets or news to their enemies. However, the history of conflict shows that such prisoners have not infrequently been subjected to threats or torture in an attempt to make them divulge military secrets or other useful information.

The falling of a prisoner of war into the hands of the adversary is therefore considered a serious danger and results in a new problem.

The question that needs to be answered at this stage is: is it permitted in Islamic Law to force prisoners of war to divulge military secrets, and how far does Islamic Law compare with international law in its treatment of this issue? The rules under the two systems are described below.

### **3.1.2.1. In Islamic Law**

There is only one recorded incident, which took place in the time of the Prophet (pbuh), when a prisoner of war was beaten to force him to reveal military secrets, and which could be taken by some Islamic scholars as evidence that Islam permits the coercion of prisoners of war. This event took place before the Battle of Badr, when the Muslims captured a slave of Bani Al Hagag who was with the Quraish as a water carrier. The Prophet's companions interrogated him about Abu Sufyan and his friends while the Prophet was praying. The slave said, "I have no idea about Abu Sufyan and his companies". The companions thought he was lying and beat him, but when the slave said, "Yes I knew that's Abu Sufyan" they believed him. The Prophet hastened to complete his prayer and said to his companions, "When he told the truth you punished him and when he told lies you believed him".<sup>30</sup>

This incident led some Islamic scholars to hold the view that it is permissible to torture prisoners of war for the purpose of obtaining military secrets. Imam Al Nawawi expressed

such a view after citing this tradition: “This tradition provides evidence of the permissibility of beating an unbeliever who has no protection contract, even if he is a prisoner”.<sup>31</sup> On the other hand, the majority of Muslim scholars hold the view that the torture of prisoners of war to force them to divulge military secrets is forbidden. Imam Maliki was asked, “Is it allowed to torture prisoners of war, if it is likely that the prisoner will reveal valuable secrets about the enemy?” His answer was, “I never heard that”.<sup>32</sup>

They support their view as follows: firstly they argue, Islam forbids torture and mutilation, since it has been narrated that the Prophet (pbuh) said, “God will penalize in the hereafter those who penalize people in this life”.<sup>33</sup> In addition, they add that the torture of prisoners of war is in conflict with the general command of Prophet (pbuh) to treat prisoners of war well.<sup>34</sup>

Zuhaili stated, “In the light of the general commands which recommend the good treatment of prisoners of war, it can be said that, under Islamic Law, it is prohibited to torture a prisoner to reveal any military secrets which could assist the Islamic fighters in their military operations”.<sup>35</sup>

With regard to the incident cited above, when Muslims tortured a prisoner of war to extract military information from him on the day of Badr, they argued that it did not provide evidence for the permissibility of the torture of prisoner of war, as the Prophet (pbuh) did not agree with his companions’ action. The Prophet hastened his prayer when he saw his companions beating the prisoner and he would not have done that unless he had observed something wrong which required intervention. Moreover, even if the Prophet did not do anything, his saying, “When he told the truth you punished him and when he told lies you



believed him” was enough to indicate that the Prophet disapproved of the torturing of prisoners of war and he implied that torture will not achieve its purpose, but it may lead to deception or it would bring harm rather than profit.<sup>36</sup>

Bearing that point in mind, observing the Prophet’s command that prisoners of war be well treated, and considering that Muslim prisoners of war will receive the same type of treatment from the adversary as Muslims give to their prisoners, it can be concluded that Islam forbids the torture of prisoners of war to obtain secret information. However, there is no prohibition under Islamic Law against obtaining military secrets or information from a prisoner of war or military suppliers legally by discussion, interviews and questioning, as it has been narrated that the Prophet (pbuh) in the above case interviewed the captive himself and obtained the correct information from him.<sup>37</sup>

### **3.1.2.2. In International Law**

In international law, the Geneva Convention 1949 defines the information which each prisoner of war is obliged to provide when he questioned, in order to ensure the correct identification of every prisoner of war. This information consists of “his surname, first names and rank, date of birth, and army, regimental, personal or serial number”. However, if the prisoner of war refuses to answer some or all of these questions, then the Detaining Power might limit the privileges to which he would be entitled according to his rank or status.<sup>38</sup>

Moreover, in any case, the parties to a conflict are prohibited from the use of physical or mental torture or any other form of coercion to force the prisoner of war to divulge military secrets, and if a prisoner of war refuses to answer any question which is propounded to him, then “he may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind” .<sup>39</sup>

Notably, the Detaining Power has the right to ask any questions and there is nothing in the Convention that prohibits either the questioning of prisoners of war, which might go further than the matters listed above, or obtaining information from prisoners of war by deception.<sup>40</sup>

Finally, the interrogation of prisoners of war shall be carried out in their own language or in a language they understand.<sup>41</sup>

### **3.1.3. The protection of prisoners of war**

This section concerns the accountability of captors for the treatment of their captives, showing the protection provided for prisoners of war against violence.

#### **3.1.3.1. In Islamic Law**

It is important before we study the subject of the protection of prisoners of war to examine two topics related to our subject, namely, the relationship between the captor and the

captive; and whether the individual, who capture him, has the right to give the *Aman* (safety) to the captive or no?

### **3.1.3.1.1. The relationship between the captor and the captive**

According to the practice at the time of the emergence of Islam, prisoners of war were considered to be in the hands of the individual who captured them, who had the right to deal with them as he chose. However, it was subsequently revealed that, Allah says, “And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah,- and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer” (H. Q. S8. A41). In addition, the practice and the general command of the Prophet (pbuh) favoured the good treatment of prisoners of war, and violence towards captives was prohibited before they were brought to *Dar al-Islam*, and a decision on their case had been made by the head of the Islamic State or his representative. It is narrated that the Prophet (pbuh) forbade fighters from killing the captives of their comrades<sup>42</sup>.

As a result of the foregoing, the majority of Islamic scholars believe that prisoners of war are considered as prisoners of the Islamic State and in its hands, rather than in the hands of the individual who captured them. Therefore, it is not legal for a captor to act towards captives in any way aggressively, and it is his duty to transport them safely to *Dar al-Islam*. Ibn Al-Humam, from the-Hanafi school, stated, “No combatant has the right to execute a prisoner of war merely by his decision, because the choice is for the head of the Islamic State”.<sup>43</sup> Shafi said, “If a Muslim kills a prisoner of war before the head of the Islamic State has decided his case, then the killer deserves punishment, as he has infringed the head of the Islamic State’s right”.<sup>44</sup> Al-Qadea Abu Yaela from the-Hanabli school confirmed,



“As soon as the adversary’s warrior falls into capture, his fate rests with the head of the Islamic State, since the prisoner is considered a prisoner of the State, not of the individual”.<sup>45</sup> From what has been cited, it appears that the captor has no right to kill his captive and if he does so he will deserve punishment. This means that his action is forbidden.

However, some Islamic scholars believe that it is permitted for a Muslim fighter to kill a prisoner whom he had captured. Imam Ahmad stated that, “A Muslim fighter must not kill the captive of another unless he has a permission from the head of the Islamic State to do so”.<sup>46</sup> This means that he has the right to kill his own captive without the head of the Islamic State’s permission. Amer argued, however, that the permission to kill a prisoner of war, referred to by Imam Ahmad, is applicable only to case where the captive shows aggression or tries to escape, so the killing in this case is not for the reason that he is a captive and his captor has power over him, but to stop his aggression or escape.<sup>47</sup> Al-Kasani expressed a similar view, that the killing of the captives before the head of the Islamic State’s decision on their fate is permissible, whether they were brought to *Dar al-Islam* or not, as they are not immune. However, if the head of the Islamic State has issued a decision on their case, in that case anyone who kills or hurts them will be liable for his behaviour<sup>48</sup>.

Arguably, the view that a prisoner may be killed with impunity by any Muslim depends on the belief that it is initially legitimate to kill prisoners of war. However, this is not correct, since the fate of prisoners of war depends on the decision of the head of the Islamic State or his representative, and that decision must be based on the interest of the Islamic nation (*Umah*). Moreover, if the fate of prisoners of war were left to any and all of the Muslims,

this would lead to anarchy and turmoil, especially in times of war, when it is not always easy to recognize how the adversary are treating Muslim prisoners in their hands, and to treat their prisoners in the Muslims' hands correspondingly.<sup>49</sup>

From the foregoing discussion, it is obvious that the general view is that the fate of the prisoner of war depends on the head of the Islamic State who will act according to the interest of Islamic State, essentially because the prisoner is considered as the State's prisoner, not an individual's prisoner.

If only the head of the Islamic State has the right to decide on the fate of a prisoner, the question now arises, who has the right to give the *Aman*<sup>50</sup> (a guarantee of safety) to a prisoner of war? Does the individual have the right to give the *Aman* to a prisoner of war or is this, too, a right reserved for the head of the Islamic State or his representative.

#### **3.1.3.1.2. Does the individual have the right to give the Aman (safety) to prisoners of war?**

The majority of Islamic scholars hold that it is permitted for any adult Muslim, free or slave, man or women, to give the *Aman* to a non-Muslim upon request.<sup>51</sup> The main evidence for this view is, Allah says, "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the Word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge." (H. Q. S9. A6). Even a soldier on the battlefield, if he lays down his arms and requests the security of his person, must be granted *Aman* according to the *Quranic* verse: Allah says, "Others you will find that wish to gain your confidence as well as that of their people: Every time they are sent back to temptation, they succumb thereto: if they withdraw not from you nor give you (guarantees)

of peace besides restraining their hands, seize them and slay them wherever ye get them: In their case We have provided you with a clear argument against them.” (H. Q. S4. A90).<sup>52</sup>

There is, however, some disagreement among Islamic scholars regarding the individual's right to give the *Aman* to a prisoner of war. The main school of thought is that the head of the Islamic State or his representative are the only people who have the right to give the prisoner of war the *Aman*. Therefore, no-one else is authorized to give the *Aman* to one who has fallen captive, as it is established above that the prisoner is in the hands of the State. Consequently, nobody is allowed to infringe the right of the head of the Islamic State and secure the prisoner. The Maliki and Hanbali hold this view. However, the Shafi hold that this applies once the transfer of prisoners of war to *Dar al-Islam* is complete and they come under the power of the head of the Islamic State, but before that, any individual has the right to give prisoners of war the *Aman*. This view is related to their opinion that before they come under the control of the head of the Islamic State, the individual has the right to kill a prisoners of war; the corollary is that he has the right to give the *Aman* also.<sup>53</sup> Conversely, the Hanafi, al-Awzaea and Abu al-Alkhatab from the-Hanbali school take the view that it is the right of all believers as individuals to give the *Aman* to prisoners of war. To support their view, they refer to the case of Zaynab (the daughter of the Prophet, pbuh) when she secured her husband Abulas Ibn al-Rabea after he was captured and the Prophet (pbuh) approved her action.<sup>54</sup>

The first school of thought support their view by referring to the case of al-Hurmuzan<sup>55</sup> when he was captured and sent to Omar (the second Caliph). Omar determined to kill him as he had repeatedly broken treaties with the Muslims. Omar asked him, “Why did you not respect your pledges of peace?” Al-Hurmuzan said, “I am afraid you will kill me before I tell you,” and gasping like one faint with thirst, he begged for a draught of water. “Give it”,



Omar said, “and let him drink in peace”. Al-Hurmuzan said, “I fear to drink, lest someone slay me unawares”. “Your life is safe”, said Omar, “until you have drunk the water up”. Al-Hurmuzan, believing that he had won his case, poured the water upon the ground. The Caliph ordered another cup to be brought, but Al-Hurmuzan said that he was no longer in need of water. “I wanted not the water,” he said, “but safety (*Aman*) and now you have given it me”. Omar said, “I am killing you”. He replied, “You gave me the *Aman*”. Omar said, “Liar”. The people around the Caliph interposed and said, “He is honest and an *Aman* was given and there is no way to kill him”.<sup>56</sup>

This School of thought argues that in this case the prisoner of war was given an *Aman* by the head of the Islamic State and nobody else has the right to countermand it and secure the prisoner. In addition, they argue that only the head of the Islamic State or his representative has the right to release prisoners of war with or without ransom, and the *Aman* is less than the release.

Finally, they argue that if any individual could give prisoners of war *Aman*, this would remove the right of the whole nation to choose what would be to their advantage. Therefore, nobody has the right to give the prisoner the *Aman*, as that would prevent the head of the Islamic State from choosing the appropriate alternative.<sup>57</sup>

Regarding the view held by the Shafi who make a distinction according to whether or not the prisoner of war has already come under the power of the head of the Islamic State, it appears that this view depends on their belief regarding the permissibility of captors killing prisoners of war. Nevertheless, this is not settled even among the Shafi themselves. Al-Sharbeni, a Shafi scholar, stated that, “If a Muslim kills a prisoner before the head of the

Islamic State has made his decision, the killer must be disciplined as he has violated the head of the Islamic State's right".<sup>58</sup>

Let us now consider the evidence cited by the Hanafi, al-Awzaea and Abu al-Alkhatab. Zuhaili stated, in the case of Abulas Ibn al-Rabea that when Zaynab, the daughter of the Prophet (pbuh) gave him the *Aman*, Abulas was not a prisoner of war but he was a non-Muslim man who had entered *Dar al-Islam* securely and asked for the *Aman*. This is supported by historical evidence, as Ibn Hisham mentioned that Abulas arrived in the night time then went to Zaynab and asked her for the *Aman* and she gave it to him. The purpose of his coming was to collect his money. However, Abulas was captured before this event, on the day of Badr, and Zaynab his wife sent his ransom. Therefore this evidence does not prove that an individual is authorized to give the *Aman* to a prisoner of war.<sup>59</sup>

From the foregoing discussion, it seems to be clear to the researcher that a Muslim fighter has the right to give the *Aman* to any combatant who lays down his arms in the combat zone and asks for it.<sup>60</sup> However, if a combatant is captured and in the hands of the Muslims, then nobody has the right to give him the *Aman*, as it could conflict with the head of the Islamic State's decision and lead to anarchy and turmoil, especially, in the time of war. Zuhaili confirmed: "We must adhere to the view, which authorises the head of the Islamic State to give prisoners of war the *Aman*, and this is supported by Islamic history in dealing with prisoners of war".<sup>61</sup>

Consequently, under Islamic Law, prisoners of war are considered to be in the hands of the State and not in the hands of the individual who captures them. Therefore, Muslim commanders (captors) have no right to give captives the *Aman*. Nevertheless, they are

obliged to treat prisoners of war humanely at all times and with as much gentleness as possible until they hand them over to the head of the Islamic State or his representative, and they are responsible before the Islamic authority for any maltreatment of prisoners of war while they are under their control. Thus, the Islamic State is required to protect prisoners of war from any violence or retaliation they may face from their captor until they are brought to *Dar al-Islam* and a decision made on their case.<sup>62</sup> Thomas confirmed that, “in all cases of POW treatment, the Islamic State bears the burden of responsibility for the POWs’ well-being”.<sup>63</sup>

In addition, the Islamic State under Islamic Law is prohibited from exposing prisoners of war to any mutilation or to any medical experimentation. This is in line with the general command of the Prophet (pbuh) when he said, “Take heed of the recommendation to treat prisoners fairly”.<sup>64</sup> Even if a prisoner of war is treated as a war criminal and a decision to execute him is issued, the execution must be carried out without mutilation.<sup>65</sup> This prohibition of mutilation and medical experimentation can be founded on the following evidence:

Firstly, it was the practice of the Prophet (pbuh), when he appointed anyone as leader of an army or detachment, especially to exhort him to fear Allah and to be good to the Muslims who were with him. He would say, “Fight in the name of Allah and in the way of Allah. Fight against those who disbelieve in Allah. Make a holy war, do not embezzle the spoils; do not break your pledge; and do not mutilate...”.<sup>66</sup>

Secondly, mutilation and medical experimentation are viewed in Islam as a change of God’s creation, and in Islam these are considered as evil acts. Allah says, “Allah did curse him, but he said: "I will take of Thy servants a portion marked off. I will mislead them, and



I will create in them false desires; I will order them to slit the ears of cattle, and to deface the (fair) nature created by Allah." Whoever, forsaking Allah, takes Satan for a friend, hath of a surety suffered a loss that is manifest" (H. Q. S4. A118-119).

Finally, exposing prisoners of war to medical experimentation is considered in Islam as an act of aggression on the human body, which is forbidden: Allah says, "but do not transgress limits; for Allah loveth not transgressors." (H.Q.S2.A190).

From these evidences, Islamic scholars agree that it is not allowed in Islam to expose prisoners of war to any mutilation or medical experimentation. However, some Islamic scholars believe that it is permitted in Islamic Law to expose the remains of deceased prisoners of war to such medical experimentation if the adversary acts in the same way and if there a clear interest.<sup>67</sup>

### **3.1.3.2. In International Law**

Under international law, the situation is no different from that which is established in Islamic Law regarding the protection of prisoners of war. From the time that prisoners fall into the power of the adversary, the Detaining Power is responsible for their treatment. Article 12 provides that, "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them".<sup>68</sup>

In addition, under the Geneva Convention, the Detaining Power is prohibited from exposing prisoners to any physical mutilation and medical or scientific experiments. Also,

prisoners of war must be protected against violence, intimidation, insults and public curiosity. Reprisals against prisoners of war are prohibited.<sup>69</sup>

### **3.1.4. The system of capture**

In this section, the arrangements for securing captives, whether through binding or through internment in camps, are considered.

#### **3.1.4.1. In Islamic Law**

Islamic Law addresses the issue of whether a captive may be bound or held in chains. This section explores the views of Islamic scholars on the subject. Consideration is also given to the place of detention and the conditions therein.

##### **3.1.4.1.1. Binding the prisoners**

Internment in war is not a punishment, but a means to prevent the combat from returning to his own power and participating on the fighting. Therefore, the Detaining Power usually takes every possible measure to prevent prisoners of war from escaping. From this perspective, Muslims used to bind some of their prisoners of war from the moment they captured them, to prevent them from escaping, and in some cases they bound the prisoner's hands to his neck; this practice was a common at that time, as there was no particular transport or prison for this purpose. During the pre-Islamic period, prisoners of war were bound with cruelty and put in chains, but with the establishment of Islam, Muslims did not

overload prisoners of war with metal (iron) and were content with rope as a means to prevent the prisoner from escaping.

Islamic scholars agree that it is permitted under Islamic Law to bind the prisoner of war during the procedure of transfer and in the place of detention. They support their view by the following:

In the Holy *Quran*, Allah commanded Muslims to bind prisoners securely. Allah said, “Therefore, when ye meet the Unbelievers (in fight), smite at their necks; at length, when ye have thoroughly subdued them, *bind (the captives) firmly*”(H. Q. S47. A4). (Emphasis added). Moreover, they cite from the *Sunna* many cases where prisoners were bound. An example is the case of Thumamh. It is narrated that the Messenger of Allah (pbuh) sent some horsemen to *Najd* (a place in Saudi Arabia). They captured a man from the tribe of Banu Hanifa, called Thumamh bin Uthal. He was the chief of the people of Yamama. He was bound to one of the pillars of the Mosque and kept for three days<sup>70</sup>. Another example is the case of Suhayl Ibn Amr. It has been narrated that the Prophet (pbuh) ordered his hands to be tied to his neck after he tried to escape.<sup>71</sup> Finally, there is the case of al-Abbas (the uncle of the Prophet) who, on the day of Badr, was bound by his wrists.<sup>72</sup>

The reason for binding prisoners of war is to prevent them from escaping or committing any act of violence, not to injure them, so if injury is caused, the restraint must be removed immediately. This is shown by the case of al-Abbas. The Prophet (pbuh) could not sleep because he heard his uncle moaning with pain from the binding. One of his companions noticed that and untied the Prophet’s uncle. The Prophet said that he did not agree that a member of his family should receive special treatment, and he ordered that all the captives should be treated equally.<sup>73</sup>



From the above discussion, it is clear that the binding of prisoners of war is permitted in Islamic Law, so the question to be answered is, does this concur with the principle of modern international law, of humane treatment at all times?

In reply to this question, Zuhaili stated that, “The binding of prisoners of war in those cases does not clash with the prohibition on binding prisoners of war except for cases of commotion (nervous state), which is established in contemporary international law, because binding of prisoners of war at that time was just a means to prevent them from escaping, since there was no special place for that purpose”.<sup>74</sup> Abdul Hameed shares this view and stated that he had, “No doubt that the motive of the binding was to prevent prisoners from escaping or violence. Therefore, if circumstances change and it is possible to attain that object without binding, then, it is not consistent with the good treatment which is recommended in Islamic Law (to bind prisoners)”.<sup>75</sup>

From the foregoing discussion, it seem to be clear that the major purpose in binding prisoners of war in the time of the Prophet was to prevent them from committing any aggression or escaping during the transfer procedure or from the place where they were detained. However, in the contemporary time the Islamic State is not allowed to bind prisoners of war except in exceptional circumstances. This is consistent with the general recommendation that prisoners of war be well treated.

### **3.1.4.1.2. Prisoners' Camps**

In the time of the Prophet (pbuh) Muslims, did not organize special camps for detaining prisoners of war, as is done at the present time, due to the simple way of life at that time. Historically, it is not certain who was the first person in Islam to establish a prison. Some scholars believe that there was no prison in the time of the Prophet, Abu Bakr, Omar and Othman (first, second and third Prophet's caliph) and prisoners were detained in the Mosque or when possible a narrow room, but that Ali (the fourth caliph) established a prison and he was the first one who set up prisons in Islam. On the other hand, others believe that prison in the sense of incarcerating the adversary and preventing him from acting freely, was practised in the time of the Prophet and Omar (the second caliph) bought a place in Makkah and used it as a prison.<sup>76</sup>

However, as a result of war between Muslim and non-Muslims, many combatants were captured on both sides and became a prisoners of war, and the Islamic State had to provide them with somewhere suitable to stay<sup>77</sup> until a decision on their case had been made. As mentioned above, in the time of the Prophet there were no special camps for prisoners. Therefore, the Prophet either detained prisoners of war in the Mosque or handed them over to his companions, as they were considered co-operators with their government<sup>78</sup>, with a recommendation of good treatment<sup>79</sup>.

This could be observed in many cases. On the day of Badr, several prisoners of war were kept in the Prophet's rooms while the Prophet split the rest among his companions and

asked them to treat them well and bind them to prevent them from escaping.<sup>80</sup> In addition, the case of Thumamh, as mentioned above, shows that he was detained in the Mosque for three days.

These cases indicate that the detention of prisoners of war in the time of the Prophet (pbuh) took place in the Mosque or in his or his companions' houses, as there was no special facility for holding them. Furthermore, the place where prisoners of war are detained must be appropriate for human beings, not injurious to their health and provide shelter from cold and heat. This can be observed from the general command of the Prophet (pbuh) that prisoners of war be well treated. The Prophet said, "Take heed of the recommendation to treat prisoners fairly" and in the case of Banu Quraiza, he ordered his companions to provide the captives with a shelter and not to expose them to the heat of the sun.

#### **3.1.4.2. In international law**

Since internment during war is not a punishment or reprisal, but a means to prevent the combatant from returning to his own home and participating in the fighting, under the Geneva Convention 1949, the Detaining Power has the right to subject prisoners of war to internment, or oblige them not to leave a definite location, or if the camp is fenced in, not to go beyond its boundary. However, the Detaining Power is not allowed to hold prisoners in close confinement in a cell or a room, or in prison with criminals, except in case of necessity.<sup>81</sup>

The Geneva Convention 1949, sets out general requirements regarding prisoner of war camps, as follows:



1- They must be located on land (internment under the ground or at sea is unlawful) and afford every guarantee of hygiene and healthfulness, and they must not be located in penitentiaries, unless in unusual circumstances where it is to the advantage of prisoners to be detained in such a place. If they are interned in unhealthy areas or where the environment is harmful for them, then they must be transferred as soon as possible to a better environment.<sup>82</sup>

2- Prisoner of war camps must be far enough from the combat zone to be out of the danger of fire.<sup>83</sup>

3- Buildings provided for prisoners of war inside the camp must be protected from dampness, provided with heating and adequately lit, particularly between dusk and lights out, and all safety measures must be taken against the danger of fire.<sup>84</sup>

4- Prisoner of war camps must have shelter against air bombardment and other dangers of war, on the same scale to which they are available to the civilian population, and any other protective measures available to the general population.<sup>85</sup>

5- Wherever military considerations permit, prisoner of war camps must be marked with the sign “ WP” (prisoners of war) or “PG” (*prisonniers de guerre*), which must be clearly visible from the air. However, parties to the conflict may agree on any other system of marking<sup>86</sup>.

In addition, the Detaining Power is required to provide the concerned Power (the Power on which the prisoners depend and its allies) with information about the location of prisoner of war camps. The purpose of that is to protect prisoners of war from accidental attack by the armed forces of their Power or its allies<sup>87</sup>. Moreover, the Detaining Power is obliged to group prisoners of war in camps or camp compounds by their nationality, language and

customs, and unless with consent, no prisoner of war can be interned separately from the armed forces with which they were serving<sup>88</sup>.

Finally, if there are women prisoners of war in the same camps as men, the Detaining Power shall provide them with separate dormitories.

### **3.1.5. The labour of prisoners of war**

Recognition of the economic worth of prisoners of war as a source of labour and their use as slaves as an alternative to killing them can be traced to ancient times. The Romans were the first who realized that. This section considers the legitimacy of employing prisoners of war in Islamic Law and international law.

#### **3.1.5.1. In Islamic Law**

Islamic scholars have discussed the subject of the employment of prisoners of war. Initially they discussed the employment of Muslim prisoners of war in the hands of the adversary. On the one hand they agree that it is permitted for Muslim prisoners to work for their captors, but only for work of a non-military character, and they must be honest and faithful with them.<sup>89</sup> Zuhaili stated, “The labour of Muslim prisoners of war is permitted, and a Muslim must not betray the owner of the work, and he should do it as well as usual. This permission is based on the general rule that everything is permitted until there is proven evidence of prohibition”.<sup>90</sup>

On the other hand, there is a disagreement among Islamic scholars regarding cases where the work has a military character or may support the enemy. Some of them believe that it is permitted for Muslim prisoners to work or participate in the case of defence against aggression which may face the captors in case of necessity, or if there a benefit for them, such as the promise of release. However, it is disliked (*Makroh*) for a prisoner to take part in any action that may give the enemy more power to fight.<sup>91</sup> However, the majority hold the view that it is prohibited for Muslim prisoners to participate in any work which may involve military action, whether it is defensive or not.<sup>92</sup> Imam Malik stated, “A Muslim should not expose himself or others to killing except for a legitimate cause. Therefore, fighting with unbelievers against unbelievers is not permitted”.<sup>93</sup> Al-Sanani confirmed, “It is not allowed for a Muslim to fight with pagans, since assisting them is forbidden, unless he fears for himself, then he should fight in his own defence only”.<sup>94</sup>

With regard to the employment of enemy prisoners of war who fall into the hands of the Islamic State, first, there disagreement among Islamic scholars on the employment of non-Muslims by Muslims (which could include prisoners of war). On the one hand, some scholars hold the view that it is not permitted to employ non-Muslims except in cases of necessity, such as if no Muslim can be found or there is no Muslim who could do the work, if the work requires special skills. Imam Al-Bukhari entitled one section of his book, “Employing non-Muslims in case of necessity”. Holders of this view support it by referring to the Prophet’s tradition, “We do not have recourse to non-believers”,<sup>95</sup> and they claim that it was a case of necessity when the Prophet (pbuh) and Abu Baker chartered a non-Muslim guide. Also, in the case when the Prophet contracted with the Jewish of Khebar, as there were no Muslims who could do the work.<sup>96</sup>



On the other hand, the majority hold that it is permitted to employ non-Muslims; they argue that the tradition cited by the first group does not provide clear evidence that the Prophet (pbuh) was in a situation of necessity. In addition, with regard to the tradition where the Prophet said, “We do not have recourse to non-believers”, they argue that the Prophet said that to a non-Muslim who offered his help while the Muslims were at *Jihad*, and the Prophet’s reply was to encourage him to enter Islam.

Furthermore, there is an excellent case which deals directly with prisoners of war. On the day of Badr, the Prophet (pbuh) employed those prisoners who were educated and had no money to ransom themselves, as teachers. Each was required to teach ten children of the Muslims how to read and write, in return for his freedom.<sup>97</sup>

This case indicates that it is legitimate under Islamic Law to employ prisoners of war and that prisoners of war are capable of earning money, as this tradition shows that prisoners were employed and gained a wage and paid their ransom, so finally they were released.

Finally, it can be stated that, Islam gives prisoners of war the right to work and to have possession of money to enable them to gain their liberty, on the condition of the approval of the Islamic State. In the Holy *Quran*, Allah urged Muslims, “And if any of your slaves ask for a deed in writing (for emancipation), give them such a deed if ye know any good in them: yea, give them something yourselves out of the means which Allah has given to you” (H, Q, S24, A33).

Arguably, it could be said that this verse is irrelevant, since it deals with the state of slave who is in the possession of his master. However, although this verse deals directly with slaves, it is also applicable to the status of prisoners of war in the hands of the Islamic State after being captured.<sup>98</sup>

From the foregoing discussion, it appears that, under Islamic Law, it is legitimate to employ prisoners of war, especially since it could be advantageous for the prisoners, as it would keep them in good health and would benefit their financial status. This is consistent with the general command of the Prophet (pbuh) for good treatment. The next question that arises is about the environment and conditions of work.

With regard to the nature of work in which the prisoners may be engaged:

First of all, prisoners of war must not be compelled to engage in any work, and they must agree to work freely. The above case shows that the prisoners were not forced to work but they were glad to do so, as they would gain their liberty. Also, in the verse where Allah referred to those who “*ask for a deed*” that means that they cannot be forced to have a contract. Therefore, they may not be employed in work which has a military character. Another reason for that, is that *Jihad* in Islam is a kind of worship which needs attention, which is not accepted from non-Muslims. It has been narrated that the Prophet said, “Nobody would be allowed to take part in the fighting along with us, who is not a follower of our religion”.<sup>99</sup> Some scholars hold this view. However, others believe that it is permitted for non-Muslims to take part in the fighting on the side of Muslims voluntarily, at the request of Muslims, and they will be entitled to compensation.<sup>100</sup>

Second, prisoners of war who work will be entitled to receive payment. The amount of payment must be fair for the work. Islam also requires the employer to pay the employee his remuneration as soon as the job is done. It is reported that Prophet (pbuh) said, “Give the employee his wage before his sweat is dry”.<sup>101</sup>

In addition, Islam has clearly and categorically forbidden depriving the employee of his wage. On this point there is clear evidence. It is narrated that the Prophet (pbuh) said, “There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgment, one of these three, is a man who employs an employee and has his work done, then does not pay him”.<sup>102</sup> The words of this tradition of the Prophet (pbuh) are general; they have not been qualified or made applicable to a particular nation, race or country, or to followers of a particular religion. This means that the Islamic State should apply to prisoners of war the same work regulations, which are applied to its own citizens.

Finally, if prisoners of war are asked to work, their capability and age must be taken into account, to ensure that they are fit for the work, and if they are asked to do work which is beyond their ability, they must get help from the authority, since the Prophet (pbuh) recommended his companions not to exhaust their slaves: “Do not oblige them to do what they cannot do, and if you do, help them”.<sup>103</sup>

The Islamic State is required to supervise working prisoners of war, to ensure that they are not mistreated, hear their complaints and to ensure that they have a fair hearing.



### **3.1.5.2. In International Law**

If prisoners of war are kept in custody for a long period without working, it may lead to deterioration in their health. Therefore, international law authorizes the Detaining Power to use the labour of prisoners of war, providing that they are fit, taking into consideration their gender, age and bodily fitness. Prisoners of non-commissioned officer rank may only be required to do supervisory work; however, suitable work must be found, if possible, at the request of those who are not employed. Officers or persons of equivalent status may not be required to work but, if they ask for it, suitable work must, as far as possible, be found.<sup>104</sup>

A significant constraint in this respect is the prohibition on work of a directly military character. An attempt to clarify the work which prisoners of war may be required to do is established in Article 50 of the Geneva Convention 1949. In addition to work related to camp administration and maintenance, prisoners of war may be compelled to work on one of “the following classes:

- (a) Agriculture;
- (b) Industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;
- (c) Transport and handling of stores which are not military in character or purpose;

- (d) Commercial business, and arts and crafts;
- (e) Domestic service;
- (f) Public utility services having no military character or purpose”.<sup>105</sup>

To prevent prisoners of war from being used as slave labour, prisoners of war will receive the same standard of work conditions: equipment, accommodation, food, and clothing, as are applicable to nationals of the Detaining Power. In addition, the Detaining Power is obliged to ensure the suitable application of national legislation concerning the protection of labour, especially the regulations for the safety of workers, and when the work needs skills, appropriate training must be given to prisoners of war.<sup>106</sup>

Prisoners of war may not be employed in unhealthy or dangerous work, such as the removal of mines, unless they volunteer to do so.<sup>107</sup>

The working day of prisoners of war must not be excessive or exceed the work hours for civilians in the same district and the time of travel to and from the work place must be counted and added to the computation of the workday. Working prisoners of war must be allowed to have a rest, of one hour or more, in the middle of the day, and 24 hours rest every week, if possible, on the day of rest of their home power. In addition, prisoners of war who complete one year working must be allowed to have eight consecutive days off.<sup>108</sup>

The health of working prisoners of war must be regularly confirmed by medical inspection, at least once every month, to ensure their fitness to work, taking into consideration the character of the work. If the prisoner deems himself unable to work, he has the right to appear in front of a medical authority who may decide that he is not fit and recommend that he be exempted from the work.<sup>109</sup>

The Detaining Power, military authorities, the commander of the camp to which such prisoners belong and persons who employ the prisoner shall be completely responsible for the protection, care, treatment, and payment of prisoners of war who work for private persons. Finally, prisoners of war who work in an exterior place must be able to make contact with the relevant prisoners' representatives.<sup>110</sup>

### **3.1.6. The financial status of Prisoners of war**

When enemy combatants are taken and held prisoners of war, questions arise as to their rights in respect of money and other possessions found on their person or sent to them in their captivity. If they work for the Detaining Power, the question of payment also arises. These issues are explored in the following paragraphs.

#### **3.1.6.1. In Islamic Law**

On the subject of the financial status of prisoners of war, discussion has already been presented regarding the personal possessions found with the prisoner in the beginning of capture. It was indicated that Islamic scholars agree that all the personal possessions of prisoners of war are regarded as booty<sup>111</sup>. Furthermore, Islamic scholars make no distinction between the money found with prisoners at the beginning of capture or that money which may be earned by prisoners during their custody; both goes to the Muslims. Shaybani stated that, "If a prisoner of war obtain anything it will become the property of the Muslims since he is under their possession and whatever thing he obtained is his profit,



and the profit of a slave is for his master; therefore, everything obtained by the prisoners goes to the Muslims”.<sup>112</sup>

This shows that Islamic scholars were affected by the practice, which occurred at that time. The question now arises, with the change in the circumstances and practice of warfare, is it legitimate under Islamic Law to establish a financial character for the prisoner of war and to protect it?

The searcher believes that, in view of the fact that there is no clear and direct evidence in the Holy *Quran* or *Sunna* to support that view, and that Islamic scholars come to their conclusion by applying the policy that was practised at that time when the conqueror had full rights over the defeated, making no difference between the defeated or his property; and that the combatants were not regular armed forces and had no regular wage but only booty. On the one hand, there has been a change in the customs of warfare in modern times. War is between States, not individuals. Therefore individuals' lives and possessions are protected. Moreover, the status of combatants has changed. They are regular soldiers who receive a wage for their work from their government. As a result of this change, we believe that under Islamic Law, the rules regulating the property of prisoners of war should change as well, and that it should be protected from confiscation. Prisoners have the right to keep their money, especially if that money is not engaged in the war in any way.<sup>113</sup>

On the other hand, there is some evidence, which may be used as an indication that prisoners of war have the capability of earning money and keeping it. The case of the prisoners on the day of Badr shows that, with the approval of the Islamic authority, prisoners of war are capable of earning money from their work, as they were required to

teach the Muslim' children how to read and write in return for their liberty, as they had no money to pay the ransom. This case proves that Islamic Law gives prisoners the ability of possessing money, as they worked till they could pay their ransom.

In addition, in the Holy *Quran*, with regard to slaves Allah says, “And if any of your slaves ask for a deed in writing (for emancipation), give them such a deed if ye know any good in them: yea, give them something yourselves out of the means which Allah has given to you” (H. Q. S24. A33).

In this verse Allah urge Muslim to let the slaves work and earn some money to purchase their liberty. If a slave is entitled to own possessions then prisoners of war should be even more so, as they are in a better position.

Finally, the Prophet (pbuh) urged Muslims to treat prisoners of war well: “Take heed of the recommendation to treat the prisoners fairly”. The maintenance of the prisoner's personal possessions one aspect of good treatment, which is not confined to providing them with food, drink and clothes.<sup>114</sup>

From the foregoing discussion, it seems clear that the financial status of prisoners of war in Islamic Law is established and that they are capable of owning money. The sources of prisoners of war's finances are the payment for their work. They must be paid a fair rate for their work, the currency found with them at the beginning of their capture, and any money which they may receive from their home or any group.

### 3.1.6.2. In International Law

Under the 1949 Geneva Convention, prisoners of war are entitled to a fair rate of pay for their work. In addition, all prisoners are to receive monthly advances of pay from the Detaining Power. They may also receive money addressed to them from their own relatives or State.

The Detaining Power is obliged to establish an account for each prisoner, counting funds confiscated from the prisoner at the beginning of captivity, his monthly pay, his working pay, and any other additional money which the prisoner may receive from his family or government.<sup>115</sup> However, for security reasons and to prevent the prisoner of war from using the cash to make a successful escape, the Detaining Power may specify the maximum amount of cash which can be held by prisoners of war at any time.<sup>116</sup>

The sources of prisoners of war's finances are<sup>117</sup> currency of the Detaining Power, which was taken from the prisoners at the beginning of capture; other currencies, not currency of the Detaining Power, which were taken at the same time and are not converted to the currency of the Detaining Power except at the request of the prisoner; and regular advances of pay made monthly by the Detaining Power which in due course will be a charge upon the Power on which the prisoners depend and will be adjusted between the States concerned at the end of hostilities. It is called an advance to show that it is part of the pay given to the prisoners in their own army. The amounts of payment may be modified by agreement between the belligerents, or where it may embarrass the Detaining Power if the advances are unduly high as compared with the pay of members of the Detaining Power's own armed forces.



In addition, the Detaining Power is obliged to deliver to prisoners of war any extra pay which may be sent from the Power on which the prisoners of war depend. The sums paid must be paid the same for each prisoner of the same category.

Prisoners of war must be paid a reasonable working rate in return for their labour from the Detaining Power direct. The said authority will set the working rate and the prisoner and his own Power must be informed of it; under no circumstances will it be less than one-fourth of one Swiss franc for a full working day.

In addition, prisoners of war must be allowed to receive transfers of funds of money, which may be sent to them collectively or individually. Finally, with the approval of the Power on which prisoners of war depend, they may be authorized to make a payment to their own State.

If prisoners of war are transferred between camps, their accounts must be transferred with them, and if they are transferred from one State to another, their monies, which are not under their property and not in the currency of the Detaining Power, must follow them. They must also be given a record of any other monies which may be left in their account.<sup>118</sup>

The Detaining Power is obligated at the end of captivity to provide each prisoner with a statement of his account signed by an authorised officer showing the credit balance. In addition, the Detaining Power is required to post to the Power on which the prisoners depend, a list of all appropriate details of all prisoners of war whose captivity has been ended, showing the amount of their credit balances. The list must be approved by an authorised representative of the Detaining Power.<sup>119</sup>

## **3.2. The rights of Prisoners of war:**

Both Islamic Law and international law contain rules to protect the physical and mental well-being of prisoners of war and to safeguard their human dignity. They secure the rights to food and clothing, communication, medical attention and freedom of religion. Each will be discussed in turn.

### **3.2.1. Their right to food and clothing**

Food and clothing are fundamental needs for all humans. To withhold them from prisoners would mean denying their human dignity and to threaten their survival. The treatment of these needs in Islamic and international law will be now considered.

#### **3.2.1.1. In Islamic Law**

Under Islamic law, prisoners of war have the right to be provided with sufficient food to keep them in good shape, because to leave them without food, to die of hunger, would be contrary to the principle of Islam that prohibits even the killing of an animal (cat) by starvation, and considers that act to lead to Hell. The Prophet (pbuh) said, “A woman went to Hell because of a cat. She locked it in a room, and did not feed it nor let it go out to eat”<sup>120</sup>. If this were the attitude of Islam towards an animal, how it would be with

humankind who has dignity? Allah says, “We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of Our Creation” (H. Q. S17. A70).

Therefore, the Islamic State is obliged to supply prisoners of war with adequate food. Abu Yousof stated that, an “Unbelieving prisoners must be fed and well treated until a decision is reached regarding them”.<sup>121</sup> That an obligation is based on the following:

First of all, in the Holy *Quran*, Allah urged Muslims to feed prisoners of war. This is required of believers who fear God and desire his forgiveness. Allah says, “And they feed, for the love of Allah, the indigent, the orphan, and the captive. (Saying), We feed you for the sake of Allah alone: No reward do we desire from you, nor thanks. We only fear a Day of frowning and distress from the side of our Lord” (H. Q. S76. A8-10). In this verse, prisoners of war are treated as Muslims, and put on the same level as indigents and orphans. Ibn al-Arabi states that, “the feeding of prisoners deserve a great reward, and this include the non-Muslim”.<sup>122</sup>

Secondly, there are many incidents in the period of the Prophet when prisoners of war were guaranteed enough food. According to the Imam Muslim, a member of the Banu Aqeel was captured and when he saw the Prophet (pbuh) he called him and said, “I am a Muslim”. The Prophet replied, “If you had said that before you fell into capture, you would have done well”, then he went out. The prisoner called him again and said, “I am hungry – feed me. I am thirsty – give me water.” The Prophet said, “That is your right”. Then he commanded that his needs should be met. Finally, he was exchanged with two Muslim prisoners who were in the hands of Thaqif.<sup>123</sup> Also relevant is the case of Thumamh who was captured



and brought before the Prophet (pbuh). He ordered his companions to detain him with kindness and when the Prophet got home, he asked his family to send food and milk to him.<sup>124</sup>

Thirdly, in another tradition, the Prophet (pbuh) is reported to have said, “The son of Adam has basic rights for three things; one of them is a loaf of bread and water”. In this tradition, there is no reference to a particular nation, race or country, or to followers of a particular religion. Therefore, whatever the origin of prisoners of war, the Islamic State is bound to provide them with adequate food and water.

Finally, the command of the Prophet (pbuh) of the good treatment of the prisoners of war in the day of Badr was of a general nature, which necessarily implies the provision of food, and that is how it was interpreted in the practice of his companions. On the day of Badr, a prisoner named Abu Aziz bin Amer reported that, when he arrived at Medinah among *ALAnsсар* (the people of Medinah) “When they had their lunch or dinner, they gave bread to me alone, while they ate dates, applying the recommendation of the Prophet, then I felt shy and returned it to them, but they refused to touch it”.<sup>125</sup>

From the foregoing discussion it is clear that prisoners of war have the right to have an adequate amount of food and this is agreed among Islamic scholars. Indeed, they go further than that and assert that, even if the head of the Islamic State has decided on the execution of the captives, they must not be tortured by starvation. The case of the Banu Quraiza proves that. Even though the Prophet (pbuh) decided to execute them, he ordered that they must be provided with food, and they were provided with dates.<sup>126</sup> Al-Sarakhasi argues that, “If Muslims decide to kill captives, they must not punish them with hunger or thirst or

any kind of torture, since there is no benefit in that".<sup>127</sup> However, what is the situation if there is a shortage of food and the Islamic State cannot provide the prisoners with adequate food? Should the Islamic State continue keeping them in custody until they die, or should they be released?

It may be said that some Islamic scholars believe that in such a circumstance, prisoners of war must be executed, as their release could sustain the enemy, since they may return and take part in future fighting.<sup>128</sup> However, the majority of Islamic scholars hold the view that they must be released. To do otherwise would be inconsistent with the practice of the Prophet (pbuh) and his recommendation of the good treatment of prisoners of war. Ibn Al-Humam confirmed that. He wondered "How it could be permitted to kill prisoners of war by hunger? If it is unavoidable because of want of foodstuff, then they must be released".<sup>129</sup>

This is illustrated by the case of Salah Al-Din Al-Ayuibi (1138-1193) who captured a large number of Crusaders, but could not find enough food for the captives. He had only two options, either to keep them as prisoners, which could have caused their deaths, or to release them. He released them all, since this is consistent with Islamic rules.<sup>130</sup>

Finally, with regard to the price of the food, prisoners of war must not be charged for their food. The Islamic State must bear the cost of their food from the public treasury. However, if there is no money available, then the responsibility rests with the Muslims as a group.<sup>131</sup>

With regard to the clothes of prisoners of war, Islamic scholars agree that under Islamic Law the Islamic State is required to provide prisoners of war with adequate clothes.<sup>132</sup> The basis of this obligation is established in the case of Alabas (the uncle of the Prophet) "As he

was captured on the day of Badr, when he was brought he was scantily dressed. The Prophet (pbuh) looked for a shirt for him. It was found that the shirt of Abdullah bin Ubai would do, so the Prophet let him wear it".<sup>133</sup>

In another tradition, the Prophet (pbuh) is reported to have said, "The son of Adam has basic rights to three things, and one of them is a piece of cloth to cover his body". The words of the above tradition are general; they have not been qualified or made applicable to a particular nations, race, country or followers of a particular religion. Accordingly, it is clear that the Islamic State is bound to provide prisoners of war with adequate clothes.

Al-Zuhaili states that, "It is not conceivable (feasible) that Islam could destroy the dignity of a human being by leaving him uncovered. This is rejected by human nature. In addition, it is initially forbidden in Islam to look at the private parts".<sup>134</sup>

Some Islamic scholars consider that the motive for clothing prisoners of war is to cover their private parts, as Al-Asqalani stated when he explained the above tradition<sup>135</sup> and Al-Zuhaili also stated. However, even though in Islam it is forbidden to look at the private parts of another and they must be covered, it seems obvious that the motive for clothing prisoners of war is not only to cover their private parts, since the Prophet (pbuh) in the above case asked for a suitable shirt for the prisoner's size, as he was a tall man. Also, the clothing of prisoners of war must depend on the weather. For instance, if the weather is chilly, then the prisoners need heavy clothes to protect them from the cold. They must also be provided with adequate clothing and it is not enough just to provide them with something to cover their private parts. Again, clothing prisoners adequately is consistent with the Prophet's recommendation of the good treatment of prisoners of war.



An example is the case of the daughter of Hatam Al-Taei<sup>136</sup>, who was captured by the Muslims. When she saw the Prophet (pbuh) she called him and said, “My father has died and my supporter has gone, so be generous with me”. The Prophet said, “I will, but do not leave hurriedly until you find one of your clan who is honest, to transport you to your home”. Then she remained in *Dar al-Islam* until a group from her clan arrived. After that, the Prophet clothed her, gave her a carrier and expenses, then she departed with them.<sup>137</sup> Some scholars have cited this case to prove that prisoners of war must be dressed, although this case shows that in Islam captives, especially those people who have a great history, must be treated with kindness. However, it could not be quoted as the basis for the obligation of clothing prisoners who are in need of dress, as it does not prove that the woman needed clothes. In addition, the Prophet clothed her after she was released and the status of prisoner of war had ended. Therefore, it seems that the Prophet (pbuh) clothed her for the sake of her father’s reputation.

### **3.2.1.2. In International Law**

Under the Geneva Convention 1949, the Detaining Power is required to provide prisoners of war with daily food, which is sufficient in quantity and nutritional quality to keep them in good health and to prevent loss of weight, taking into account their customary diet.<sup>138</sup> In addition, the Detaining Power is required to provide prisoners of war who work with such extra rations as are necessary for the labour on which they are employed.<sup>139</sup>

The Geneva Convention 1949 requires and allows the Detaining Power to use prisoners of war in preparation of their food, including any additional food, which they may have in their possession.<sup>140</sup> And the fifth paragraph of Article 26 requires the Detaining Power that adequate mess facilities are to be provided. Also, prisoners of war must at all times be supplied with adequate amounts of drinking water.<sup>141</sup>

The last paragraph of Article 26 prohibits the Detaining Power from using a collective reduction of food as a disciplinary sanction of a group of prisoners of war for alleged misbehaviour by some of them.

With regard to clothing, Article 18 provides that prisoners of war may keep “articles used for their clothing”. Moreover, Article 27 requires the Detaining Power to provide them with adequate quantities of clothing, underwear and footwear. If the Detaining Power has captured enemy uniforms it may use them for this purpose, if they are suitable for the climate where the prisoners of war are detained.<sup>142</sup>

The second paragraph of Article 27 requires the Detaining Power to guarantee the regular replacement and repair of clothing, and the supply of clothing appropriate to the work that prisoners are given.<sup>143</sup>

Additionally, the convention requires two canteens be established in prisoner of war camps for the purchase of food, soap, tobacco and ordinary articles of daily use, at the price of the local market. Profit made from camps’ canteens sales must be put in a particular fund to be supervised, with the assistance of the prisoners’ representative, for the benefit of the prisoners. When a prisoner of war camp is closed down with a credit balance in such a

fund, the balance must be passed to an international welfare organization for the benefit of prisoners of war of the same nationality at those from whom it arose. In case of general repatriation, such balance shall be kept by the Detaining Power unless there is an express contrary agreement between the powers concerned.<sup>144</sup>

### **3.2.2. Their right to communicate with the outside world**

Communication with the outside world is a psychological comfort to prisoners of war and may have the benefit of allowing them to receive money or goods from home. It may, however, pose the risk that they will arrange their escape, or pass on sensitive information which will help their party against the Detaining Power. What are the rights of prisoners of war in this regard?

#### **3.2.2.1. In Islamic Law**

On the subject of the right of prisoners of war to communicate with the outside world, the researcher could not find any specific case from the time of the Prophet (pbuh) where prisoners of war practised the sending and receiving of letters or relief shipments. This is due to the difference of circumstances, as at that time, prisoners of war were transferred to *Dar Al-Islam* and detained under the control of the Islamic State until a decision on their case was issued by the head of the Islamic State or his representative. The only correspondence that occurred at that time, with their people, concerned their release and it was conducted through the Islamic State.



However, in the researcher's view, the Islamic State is obligated to allow prisoners of war to correspond with their home since there is no evidence (either explicit or implicit) in Islamic Law to support its prevention. Therefore, the ruling concerning our subject which should be applied is "the Permissibility Rule" (When Islamic scholars refer to the "Permissibility Rule" they mean an initial presumption that all things are permitted. A behaviour is considered permissible unless and until a direct command to the contrary is received or a prohibition is inferred from, for example, the Prophet's behaviours) which would allow the prisoner of war to communicate with their home. This rule would continue to apply until there is evidence for change or conflict with another rule, neither of which applies in this case.<sup>145</sup>

Allowing prisoners of war to send and receive letters or receive relief from outside does not damage the Islamic State or conflict with its advantages in any way, and is considered as a measure to improve the well-being of prisoners of war and maintain their morale. To deny prisoners this resource could lead to the opposite and would be inconsistent with the general command of the Prophet (pbuh) to treat prisoners of war well.<sup>146</sup>

Furthermore, according to some Islamic scholars, prisoners of war must be allowed to write and send wills to deal with their possessions at home, Hamidullah stated prisoner, "Has the right to draw up wills for the property at home".<sup>147</sup>

Finally, Islamic Law pays attention for the morals of prisoners of war, for example, asserting that if there are relatives among the prisoners, they must not be separated from each other. It has been narrated that the Prophet (pbuh) said, "Inhibit the separation of the mother and her son, the father and his son or between brothers among captives".<sup>148</sup> The

motivation of that is to take care of the prisoners' morale. On the same basis, it is likely that prisoners of war would be allowed to communicate with their homes.

With regard to receiving a relief shipment, the Islamic State is obligated to provide prisoners with their needs such as food, drink and clothes. Consequently, it is likely that prisoners will be allowed to receive such items from their homes.

The foregoing discussion show that the Islamic State is obligated to allowed prisoners of war to send and receive letters or relief shipments from their home. However, the Islamic State is authorized to censor the correspondence of prisoners of war, if there is a reason to think that the prisoners are violating the normal purpose of the correspondence.

#### **3.2.2.2 In International Law**

From a humanitarian consideration and for the purpose of alleviating the inconvenience of the prisoners of war and their families of a long captivity, the Geneva Convention 1949, obligated the Detaining Power, as soon as possible or, in any case, not later than a week after arrival in a prisoners of war camp, or even a transit camp, to allow prisoners of war to send a "capture card"<sup>149</sup> to their families and to the Central Tracing Agency, notifying them of the fact of their capture, address, and state of health. The Detaining Power is expressly urged to accelerate the forwarding of these capture cards to their destination and is forbidden from any delay.<sup>150</sup>

In addition, prisoners of war must be allowed to send and receive letters and cards. There is no limit on the number of letters and cards, but in any event should be no less than two letters and four cards monthly. However, in extraordinary cases, such as difficulties of translation due to difficulty in finding sufficient qualified linguists to carry out the necessary censorship, the Detaining Power may reduce the minimum monthly number to less than the foregoing number. This may only be done when the Protecting Power is satisfied that it will be in the interests of the prisoners of war. Numerical limitation on the correspondence addressed to prisoners of war may be ordered only by the Power on which they depend, although probably at the request of the Detaining Power, and never as a disciplinary sanction.<sup>151</sup>

Under the Geneva Convention, prisoners of war have the right to send a telegram if they have had no news for a long time, are not able to receive news by the ordinary postal route, or are at a great distance from their homes. The cost will be paid directly by the prisoner of war or charged to his account in camp.<sup>152</sup>

The correspondence of prisoners of war shall be written in their native language, however, the Detaining Power may allow them to use other languages.<sup>153</sup> Mail may be censored only once, as quickly as possible and the difficulties of censorship may not be used as an alleged reason to delay the mail.<sup>154</sup>

With regard to parcels which contain foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet the needs of prisoners of war, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or



their cultural activities, prisoners of war must be allowed to receive them by post or any other means of individual or collective shipments.<sup>155</sup> These shipments, which the prisoners of war may receive, will not liberate the Detaining Power from its obligation toward the prisoners of war, imposed by the present Convention.<sup>156</sup>

The Powers concerned may conclude a special agreement on the conditions for sending of individual parcels or collective relief. However, such agreement should not cause delay in receiving these shipments by prisoners of war,<sup>157</sup> or limit the right of prisoners of war's representative to take possession of collective relief shipments sent to prisoners of war, to distribute them or to arrange them in the interest of prisoners of war.<sup>158</sup> Nor may it limit the right of the Protecting Power, the International Committee of the Red Cross or any other organization responsible, to forward a collective shipment or supervise the distribution of such a shipment to the prisoners.<sup>159</sup>

Mail, relief shipments, and money orders to and from prisoners of war must be exempt from postage, import, customs and other dues. The cost of transportation of the relief shipment shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories. Other costs shall be charged to the senders.<sup>160</sup>

The Detaining Power must also provide prisoners of war with facilities to prepare and transport through the Protecting Power or other appropriate agency, paper or legal documents, most especially powers of attorney and wills.<sup>161</sup>

### **3.2.3. Their right to have medical attention**

At some stage in capture, prisoners of war may experience some health trouble and will be in need of health care. The question that now arises is; do prisoners of war have the right to obtain medical consideration under Islamic and International law?

#### **3.2.3.1. In Islamic Law**

With regard to the right of the prisoners of war to have medical attention, the Islamic State is obligated to provide them with adequate medical attention. This obligation can be found in the general command of the Prophet (pbuh) on the Day of Badr, when he handed prisoners over to his companions and urged them to treat the prisoners well. The Prophet said, “Take heed of the recommendation to treat prisoners fairly”. Providing prisoners of war with adequate food and drink is not enough to apply good treatment. It also comprises medical care for those who need it.<sup>162</sup>

As stated above, the case of the Banu Aqeel prisoners supports that view. As the Prophet (pbuh) passed by him, he called out, “O Muhammad, O Muhammad!” He came to him and said, “What is the matter?” He said, “I am hungry – feed me. I am thirsty – give me water.” The Prophet said, “That is your right”. Then the Prophet (pbuh) commanded that his needs should be met. And there is no doubt that medical attention is what a sick prisoner needs.

Another example is the case of the prisoners of war from the Battle of Badr. The Prophet (pbuh) command their bonds to be relieved since he heard them sighing. Al-Buhakye stated, “When the Prophet got ready to sleep on the Day of Badr, while the prisoners were

lied and kept in custody, the Prophet could not sleep as he heard his uncle sighing at his bonds. One of his companions noticed that and reduced his chain. When the Prophet found out, he did not like that his relative should receive a better (different) treatment, so he ordered all the prisoners' chains to be reduced".<sup>163</sup> And there is no doubt this command and concern of the Prophet (pbuh) to reduce the bonds of prisoners of war is considered as a kind of medical care.

Finally, Islamic scholars agree that prisoners of war must be treated well until a decision on their case has been issued.<sup>164</sup>

From the foregoing, it is obvious that the Islamic State requires sick prisoners to be provided with adequate attention to their health, both physical and psychological. However, if it is not possible to provide a prisoner with adequate attention where he is detained, then he must be taken to a place where it is possible to treat him, under the supervision of the Islamic authority.<sup>165</sup>

### **3.2.3.2 In International Law**

Article 15 of Geneva Convention reads, "The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health."<sup>166</sup> This is the fundamental provision in the Convention regarding medical care. This provision is very general and more details are given in Articles 29, 30, and 31.



The Detaining Power is obliged to take all measures necessary in the prisoners of war' camps to maintain an adequate standard of sanitation for the general health and comfort to prisoners of war and to prevent epidemics. Therefore, the Detaining Power must provide prisoners of war with adequate bathing, showering and laundry facilities and the time to use them. In addition, sufficient water and soap must be provided for their personal cleanliness and for washing laundry. Also, clean and hygienic lavatory facilities, available day and night, must be provided, and if there are women prisoners in the same camp, separate lavatory facilities must be provided for them.<sup>167</sup>

An adequate infirmary must be established in a prisoner of war camp, with any necessary isolation wards for the treatment of contagious or mental illnesses. In case of critical cases requiring surgery or special hospital care, prisoners of war must be transferred to a military or civilian hospital where they can obtain the needed treatment, even if their repatriation is imminent. In case of disablement or blindness, rehabilitation facilities must be afforded. Prisoners of war have the right to obtain a medical establishment for examination, and upon the request of a prisoner of war, the Detaining Power must give him an official certificate and a duplicate forwarded to the central prisoners of war agency, indicating the nature of his illness or injury for what he was treated, and the supply of dentures, and the costs of any necessary appliances borne by the Detaining Power. This certificate may be used by the prisoners in securing accident and disability compensation from the Power of Origin. Finally, if possible, prisoners of war shall receive medical attention from the medical personnel of the power on which they depend or of their nationality.<sup>168</sup>

Each prisoner of war must receive at least one monthly medical inspection including weight recording, checking of cleanliness and general health condition, and diagnostic tests to

detect contagious diseases such as tuberculosis, malaria and venereal disease, and for this purpose the most efficient available methods of diagnosis must be used.<sup>169</sup>

The Detaining Power, in order to meet its obligation, may require prisoners of war, who are medically trained but not attached to medical service of their armed forces, to apply their professional skills for the benefit of prisoners of war of their own nationality or who depend on the same power. In this case, such personnel will continue to be “prisoners of war” and entitled to the same treatment as corresponding medical corps personnel, but may not be required to perform any other work.<sup>170</sup>

### **3.2.4. Their right to practise their religion**

Prisoners of war may have other beliefs than their captors and want to practise their religion while they are in detention. In this section, we will examine the right of prisoners of war of practise their religion inside the camps in Islamic and international law.

#### **3.2.4.1. In Islamic Law**

In the beginning of our discussion, we should answer the question, Is it permissible to oblige people to adopt Islam? In other words, is the verse, “ Let there be no compulsion in religion” (H. Q. S2. A256) abrogated or does it still apply?

Islamic scholars have different views regarding to this verse and we can summarize them in three views<sup>171</sup>. First, there are those who hold that this verse is abrogated; since the Prophet (pbuh) obliged Arabs to adopt Islam and he did not agree to accept from them any other

faith than Islam. They argue that this verse is abrogated by verses, which command Muslims to fight unbelievers such as, Allah said: “O Prophet! strive hard against the Unbelievers and the Hypocrites, and be firm against them.”(H. Q. S9. A73), and: “O ye who believe! Fight the Unbelievers who gird you about, and let them find firmness in you: and know that Allah is with those who fear Him.” (H. Q. S9. A123).

The second group are those who believe that this verse is not abrogated, but is applied to the “people of a book” (Jews and Christian), and people who are treated as people of a book, like Megan, while pagans must be forced to adopt Islam, and the above verses were revealed regarding their status.

The third opinion is that this verse is neither abrogated nor specific, since this *Quranic* verse is general and there is no direct evidence for the specification. In addition, there is no conflict between it and other verses. Al-Jassas states that, “On the one hand it could be said that this verse was revealed before those verses which command fighting unbelievers, then it was abrogated toward Arabic pagans while it remained applicable toward people of a book who had an agreement with Muslims. On the other hand, it could be said that this verse is applied in all cases toward all unbelievers, in view of the fact that, if a pagan changed his belief and became a Jew or Christian, we could not force him to adopt Islam”.<sup>172</sup>

Ibn Taimiah states, “The majority of the old Islamic scholars believe that this verse is not abrogated or stipulated, but it is a general text. Consequently, we are not allowed to force anyone to adopt Islam”.<sup>173</sup>



We believe that the last view is preferable, since there is no decisive evidence supporting the other views. In addition, compulsion is incompatible with religion as religion depends upon faith and will, which cannot be obtained by force.

From the foregoing discussion, it is obvious that under Islamic Law, it is not legitimate to force people to adopt Islam, and that Islam pledges freedom of religion. From this view, and returning to our subject, do prisoners of war have the right to practise their religion?

The answer is yes. Prisoners of war have the right to practise their religion while they are detained, since the above regulation includes the status of prisoner of war and there is no evidence to exclude them. In addition, allowing prisoners of war to practise their religion could improve the well-being of prisoners of war (mentally and physically) and this is consistent with the general command of the Prophet (pbuh) to treat prisoners of war well. “Take heed of the recommendation to treat prisoners fairly”.<sup>174</sup> Therefore, the Islamic State is required to permit prisoners of war to practise their religion under its regulation, particularly as no damage could be imposed upon Islamic State by letting them do so.

#### **3.2.4.2. In international Law**

Under the Geneva Convention, prisoners of war have complete freedom to exercise their religion, and the Detaining Power is required to permit attendance at religious services of the prisoner's faith, subject only to the condition of obedience to the disciplinary regulations of the Detaining Power.<sup>175</sup> The Detaining Power is authorized to retain chaplains for the purpose of ministering to prisoners of war belonging to the same forces, speaking the same language or practising the same religion.<sup>176</sup> Prisoners who are ministers

of religion but not engaged in their religious capacity while serving in their armed forces are at liberty to act as chaplain while they are in detention and minister to members of their faith. They will be entitled to be treated as chaplains retained by the Detaining Power, and they shall not be required to perform any other work.<sup>177</sup>

In case no chaplain or equivalent minister formally designated as religious personnel is available on the camp, a qualified layman may, with the approval of the prisoners of war constituting the religious community, be appointed at the request of the prisoners of war themselves, to perform religious duties. Such an appointment is subject to the approval of the Detaining Power and where appropriate, the local authorities of the denomination concerned. Laymen so appointed must exercise their function in accordance with the regulations of the Detaining Power with respect to discipline and military security.<sup>178</sup>

The Detaining Power is under a duty to encourage prisoners of war in the practice of intellectual, educational and recreational pursuits, sports and games. In addition, the Detaining Power is required to provide them with adequate premises and the necessary equipment, including suitable space for physical exercise, and for sports and games. However, the individual preferences of prisoners of war must be respected.<sup>179</sup>

## **Conclusion**

Both Islamic and international law give humanitarian consideration to the dignity of prisoners of war and to their physical and psychological well-being. In Islamic Law, explicit models of behaviour with regard to the provision of food and clothing can be found in the actions of the Prophet (pbuh). These precedents give rise to clear rules and obligations in Islam. The situation with regard to communication with the outside world, and provision of medical attention, is less clear, in the sense that there are no specific precedents to follow. Rather, these rights are inferred from general injunctions to humane treatment, or by analogy. Most contentious is the question of religious freedom. Scholars point to contradictory verses, and argue as to which of them is applicable, or in what circumstances. Nevertheless, we have suggested that the right for prisoners of war to practise their own religion exists in Islamic Law.

By comparison, the rights in international law have been specified more explicitly and in detail. The law provides administrative procedures for securing those rights, lays down quantitative and qualitative standards (as in the case of number of letters or cards to which a prisoner is entitled) and specifies arrangements for meeting the costs associated with the exercise of the various rights. The need to specify such details can be seen as a reflection of the complexities of modern life and international relations.



### **Endnotes to Chapter Three**

<sup>1</sup> Al-Zuhaili, *Athar al-Harb*, op cit, p463.

<sup>2</sup> Al-Bukhari, op cit, Jihad section, vol 5, p 166.

<sup>3</sup> Al-Shwkani op cit, vol 8, p 82.

<sup>4</sup> Al-Zuhaili, *Athar al-Harb*, op cit, p 464.

<sup>5</sup> Ibn Qudamah, , al-Muqni, op cit, vol 8, P485.

<sup>6</sup> Amer, op cit, p 144. See also, Thomas, Troy S, Prisoners of War in Islam: A Legal Inquiry, *Muslim World*, Jan 97, Vol 87, No 1, pp44-47. Hekal states that, "A Muslim should not accept an enemy combatant as a prisoner, even if he throws down his weapons, before the victory of the Muslim army, See Hekal, op cit,, vol 3, p 1555.

<sup>7</sup> Hekal, op cit, vol 3, p 1531.

<sup>8</sup> Al-Sarakhasi, al-Siyar, op cit, vol 3, p 1038. See also, Al-Kasani, op cit, vol 7, p 133. See also, Ibn Qudamah, al-Muqni, op cit, vol 10, p 437.

<sup>9</sup> Amer, op cit, p166.

<sup>10</sup> Hamidullah, op cit,, p 209.

<sup>11</sup> Al-Shathlei, Mohammed Nabeil, *Ahkam al-Asra fil-Faqh al-Islami*, Cairo, Dar al-Nahdah al-Araba, 1413 A.H, 1994 A.D, p21.

<sup>12</sup> Ibn Al-Humam, op cit, vol 5, p 477.

<sup>13</sup> Al-Sarakhasi, al-Siyar, op cit, vol 3, p 1029. See also, Al-Shwkani, op cit, vol 8, p25.

<sup>14</sup> Al-Waqadi, Mohammed Ibn Omar, *Al-Maqazi*, Bierut, Ilam al-Kutub, 1404 A.H, 1984 A.D, vol 1, p 118.

<sup>15</sup> Al-Sarakhasi, al-Siyar, op cit, vol 3, p 1028. See also, Al-Bahuti, op cit, vol 3, p 51.

<sup>16</sup> Al-Sarakhasi, al-Siyar, op cit, vol 3, p1045.

<sup>17</sup> Amer, op cit, p153.

<sup>18</sup> Levie, Howard S., op cit, p98.

<sup>19</sup> The 1949 Geneva Convention.

<sup>20</sup> Article 19, first paragraph.

<sup>21</sup> Article 23, first paragraph.

<sup>22</sup> Article 19, second paragraph.

<sup>23</sup> Levie, Howard S., op cit, p100.

<sup>24</sup> Article 20, first paragraph.

- <sup>25</sup> Article 20, second paragraph.
- <sup>26</sup> Article 18, first paragraph.
- <sup>27</sup> Article 18, second paragraph.
- <sup>28</sup> Article 18, third, fourth and fifth paragraphs.
- <sup>29</sup> Article 18, last paragraph.
- <sup>30</sup> Muslim, vol 12, p 125. See also, Abu Dawood, op cit, vol 3, p 78.
- <sup>31</sup> Al-Nawawi, al-Sharah, op cit, vol 12, p125.
- <sup>32</sup> Al-Tabari, Ibo Jafer Mohammed Ibn Jarer, Akhtelaf Al Faqaha Ketab al-Jiahd Wal-Jezeh Wal-Ahkam al-Muharbeen, Leadan, 1933 A.D, p 172. (hereinafter Al-Tabari, al-Akhtelaf).
- <sup>33</sup> Al-Bukhari, op cit, vol 6, p 149.
- <sup>34</sup> Al-Zuhaili, Athar Al Harb, op cit, p411.
- <sup>35</sup> Ibad, p 415.
- <sup>36</sup> Ibad, p 416. See also, Abdul Hameed, Ibraheem, op cit, p163.
- <sup>37</sup> Ibn Hisham, op cit, p 114. See also, Alsumaih, Prisoners of war , op cit, p82.
- <sup>38</sup> Article 17, first paragraph.
- <sup>39</sup> Article 17, third paragraph.
- <sup>40</sup> Levie, Howard S., op cit, p108.
- <sup>41</sup> Article 17, last paragraph.
- <sup>42</sup> Ibn Qudamah, al-Muqni, op cit, vol 8, p 398. See also, Al-Zuhaili, Athar al-Harb, p 417, footnote 2.
- <sup>43</sup> Ibn Al-Humam, op cit, vol 4, p306.
- <sup>44</sup> Al-Khteeb, Mohammad Al-Sharbeni, Muqni Al-Muhtaj Ela-Mereaft al-Fad al-Mainhaj, Cairo, Matbat Mustafa al-Babi al-Halabi, 1377 A.H/ 1958 A.D, vol 4, p228.
- <sup>45</sup> Ibn Qudamah, al-Muqni, op cit, vol 8, p 398.
- <sup>46</sup> Ibid, vol 7, p407.
- <sup>47</sup> Amer, p 151.
- <sup>48</sup> Al-Kasani, op cit, vol 7, pp120-121.
- <sup>49</sup> Al-Zuhaili, Athar al-Harb, op cit, p279. See also, Amer, p 152.
- <sup>50</sup> *Aman* is a pledge of security by virtue of which an unbeliever would be entitled to protection, while he is in the Dar al-Islam, by Muslim authority.
- <sup>51</sup> Maliki, Shafi and Hanabli. Al-Khteeb, op cit, vol 4, p 237. See also, Ibn Qudamah, al-Muqni ,op cit, vol 10, p434. See also, Khadduri, War and Peace, op cit, p164.

<sup>52</sup> Hashmi, Sohail H, Saving and Taking Life in War: The Modern Muslim Views, Muslim World, Apr 99, Vol 89, No 2, pp158-174.

<sup>53</sup> Shafi said, "Whoever gave Aman to the prisoner, it is not acceptable, as he by doing this abolishes the Imam's options of killing, enslaving, releasing and ransoming". Al-Sherazi, Abrahem Ibn Ali, Almuhatb, Cairo, Mutbat Esa al-Babi al-Halabi, vol 2, p235. Hanabli said, "Aman is not accepted from the individual unless it is approved by the Imam". See also, Al-Bahuti op cit, vol 3, p104. See also, Al-Zuhaili, Athar al-Harb, op cit, p 280.

<sup>54</sup> Ibn Qudamah, al-Muqni, op cit, vol 10, p434. See also, Al-Zuhaili, Athar al-Harb, op cit, p 287.

<sup>55</sup> Al-Hurmuzan was a famous Persian commander who fought the Muslims early in the conquest of Iraq, 640 AD.

<sup>56</sup> Al-Sarakhasi, al-Siyar, op cit, vol 1, p 263.

<sup>57</sup> Khadduri, War and Peace, op cit, p129. See also, Al-Zuhaili, Athar al-Harb, op cit, p 278. See also, Al-Shathlei, op cit, p29.

<sup>58</sup> Al-khteeb, op cit, vol 4, p228.

<sup>59</sup> Al-Zuhaili, Athar al-Harb, op cit, p280. See also, Ibn Hisham, op cit, vol 1, p 657.

<sup>60</sup> Hashmi, Sohail H, op cit, p173.

<sup>61</sup> Al-Zuhaili, Athar al-Harb, op cit, p280.

<sup>62</sup> Amer, op cit, p 155.

<sup>63</sup> Thomas, Troy S, op cit, p50.

<sup>64</sup> Al Tabarani, Sulaiman Ibn Ahmad Ibn Iyub, Al-Muajam al-Kabeer, Hamdi al-Salafi (Edi), Baghdad, Ministry of al-Awqaf, no date, vol 23, p393.

<sup>65</sup> This is consistent with the Prophet's (pbuh) Hadith, "If you slay, slay without making them suffer".

<sup>66</sup> Muslim, op cit, Jihad section, H. No. 4294.

<sup>67</sup> Hakail, op cit, vol 2, p1314.

<sup>68</sup> Article 12, First paragraph.

<sup>69</sup> Article 13.

<sup>70</sup> The rest of the story is as follows: People bound him to one of the pillars of the mosque. The Messenger of Allah (pbuh) came out to (see) him. He said: O Thumama, what do you think? He replied: Muhammad, I have a good opinion of you. If you kill me, you will kill a person who has spilt blood. If you do me a favour, you will do a favour to a grateful person. If you want wealth, ask and you will get what you will demand. The Messenger of Allah (pbuh) left him (in this condition) for two days, (and came to him again) and said: What do you think, O Thumama? He replied: What I have already told you. If you do a favour, you will do a favour to a grateful person. If you kill me, you will kill a person who has spilt blood. If you want wealth, ask and you will get what you will demand. The Messenger of Allah (may peace be upon him) left him until the next day when he (came to him again) and said: What do you think, O Thumama? He replied: What I have already told you. If you do me a favour, you will do a favour to a grateful person. If you kill me, you will kill a person who has spilt blood. If you want wealth ask and you will get what you will demand. The Messenger of Allah (pbuh) said: Set Thumama free. He went to a palm-grove near the mosque and took a bath. Then he entered the mosque and said: I bear testimony (to the truth) that there is no god but Allah and I testify that



Muhammad is His bondman and His messenger. O Muhammad, by Allah, there was no face on the earth more hateful to me than your face, but (now) your face has become to me the dearest of all faces. By Allah, there was no religion more hateful to me than your religion, but (now) your religion has become the dearest of all religions to me. By Allah, there was no city more hateful to me than your city, but (now) your city has become the dearest of all cities to me. Your horsemen captured me when I intended going for Omar. Now what is your opinion (in the matter)? The Messenger of Allah (pbuh) announced good tidings to him and told him to go on to Omar. When he reached Mecca, somebody said to him: Have you changed your religion? He said: No! I have rather embraced Islam with the Messenger of Allah (pbuh). By Allah, you will not get a single grain of wheat from Yamama until it is permitted by the Messenger of Allah (pbuh). See Al-Bukhari, op cit, al-Maqazee Section, vol 8, p78. See also, Muslim, op cit, Jihad section, vol3, p1386. See alos, Al-Nawawi, al-Sharah, op cit, vol 12, p87.

<sup>71</sup> Amer, p162.

<sup>72</sup> Al-Bukhari, op cit, vol 9, p89.

<sup>73</sup> Ibid.

<sup>74</sup> Al-Zuhaili, Athar al-Harb, op cit, p410.

<sup>75</sup> Abdul Hameed, Ibraheem, op cit, p 159.

<sup>76</sup> Amer, p145 footnote (43).

<sup>77</sup> Alsumah, Prisoners of war, p81.

<sup>78</sup> Al-Zuhaili. Athar al-Harb, op cit, p399.

<sup>79</sup> Al-Bukhari, vol 9, p89.

<sup>80</sup> Al-Bukhari, vol 9, p89. See also, Ibu Dawood, op cit, Jihad section, vol 3, p 57. See also, Al-Zuhaili, Athar al-Harb, op cit, p399.

<sup>81</sup> Article 21, first paragraph. See El-Far, A., op cit, p211.

<sup>82</sup> Article 22.

<sup>83</sup> Article 23, first paragraph.

<sup>84</sup> Article 25, third paragraph.

<sup>85</sup> Article 23, second paragraph.

<sup>86</sup> Article 23, last paragraph.

<sup>87</sup> Article 23, third paragraph.

<sup>88</sup> Article 22, last paragraph.

<sup>89</sup> Al-Shafi, Al-Um, vol4, p188. See also, Ibn Qudamah, al-Muqni, op cit, vol 8, p483.

<sup>90</sup> Al-Zuhaili, Athar al-Harb, op cit, p469.

<sup>91</sup> Al-Sarakhasi, al-Siyar, op cit, vol 4, p1518. See also, Al-Tabari, al-Akhtlaf, p 187. See also, Ibn Qudamah, al-Muqni, op cit, vol 8, p483.

<sup>92</sup> Al-Shafi, Al-Um, vol4, p159. See also, Malik, Al-Mudaunah Al-Kubra, vol3, p 32. See also, Al-Bahuti, op cit, vol 3, p110.

<sup>93</sup> Malik, Al-Mudaunah Al-Kubra, vol3, p 32.

<sup>94</sup> Al-Sanani, Ahmad Ibn Al-Qasem, Al-Taj Al-Mudahab Le-Ahkam Al-Madhab, Yaman ,Maktabat al-Yaman, 1366 A.H, 1947 A.D, vol 4, p442.

<sup>95</sup> Al- Asqalani , op cit. See also, Abu Dawood, op cit, H. No. 2356. See also, Ibn Majah, op cit, H. No. 2822.

<sup>96</sup> Al-Bukhari, op cit, Wage section, H. No. 2263.

<sup>97</sup> Ibn Hisham, op cit, vol 2, p 304.

<sup>98</sup> Thomas, Tory s, op cit, pp 44-53.

<sup>99</sup> Al-Waqadi, op cit, p40.

<sup>100</sup> Khadduri, Islamic Nations, op cit, p109.

<sup>101</sup> Malik, Al- Muwta, op cit, H. No. 1194. See also, Ibn Majah, op cit, H. No.2434.

<sup>102</sup> Al-Bukhari, op cit, H. No. 2227.

<sup>103</sup> Al-Bukhari, Believe section, vol 1, p84, H. No. 30.

<sup>104</sup> Article 49. See also, Hilaire, McCoubrey, op cit, p98.

<sup>105</sup> Article 50.

<sup>106</sup> Article 51. See also, Rowe, Peter, op cit, P165.

<sup>107</sup> Article 52. During the 1982 Falklands conflict, some Argentinean prisoners were involved in the work of the clearance of mines, and it was confirmed by the ICRC that they did it voluntarily.

<sup>108</sup> Article 53.

<sup>109</sup> Article 55.

<sup>110</sup> Article 56-7.

<sup>111</sup> See supr 3.1.1.1.

<sup>112</sup> Al-Sarakhasi, al-Siyar, op cit, vol3, p836.

<sup>113</sup> Amar, op cit, p167.

<sup>114</sup> Ibad, p168.

<sup>115</sup> Article 64.

<sup>116</sup> First paragraph of Article 58.

<sup>117</sup> Article 59-63.

<sup>118</sup> Third paragraph of Article 65.

- <sup>119</sup> Article 66.
- <sup>120</sup> Al-Bukhari, op cit, H. No. 2192. See also Muslim, op cit, H. No. 4160.
- <sup>121</sup> Abu Yousuf, op cit, p261.
- <sup>122</sup> Ibn Al-Arabi, Abo Bakr Muhammed Ibn Abdul Allah, Ihkam al-Quran, Cairo, Dar al-Kutub al-Almeeh, 1367 A.D/ 1957 A.D, vol 4, p307.
- <sup>123</sup> Muslim, vol3, p1262. see also, Abu Dawood, op cit, vol3, p239.
- <sup>124</sup> Ibn Hisham, op cit, vol4, p266.
- <sup>125</sup> Ibad, vol2, p299.
- <sup>126</sup> Al-Sarakhasi, al-Siyar, op cit, vol3, p 1029.
- <sup>127</sup> Ibde.
- <sup>128</sup> Ibid, p1045.
- <sup>129</sup> Ibn Al-Humam, op cit, vol5, p477.
- <sup>130</sup> Abu-Zahra, al-Alaqat, op cit, p 103. See also, Alsumaih, prisoner of war, op cit, p74.
- <sup>131</sup> Al-Razee, Tafseer Al-Razee, al-Matbah al-Masreh, 1375, 1938, vol3, p242. See also, Hamidullah, op cit, p213.
- <sup>132</sup> Al-Zuhaili, Athar al-Harb, op cit, p413.
- <sup>133</sup> Al- Asqalani, op cit, Jihad section, clothes the prisoner's section, H. No. 3008.
- <sup>134</sup> Al-Zuhaili, Athar al-Harb, op cit, p413.
- <sup>135</sup> Al- Asqalani, op cit, vol 6, 161.
- <sup>136</sup> Hatam Al-Taei was considered one of the Arab knights and a model of generosity.
- <sup>137</sup> Ibn Hisham, op cit, vol4, p266.
- <sup>138</sup> Article 26, first paragraph. Under 1929 Convention, Article 11 requires the Detaining Power to provide prisoners of war with the same food in the quantity and quality which the Detaining Power provides for its own troops. However, the experience of World War II shows many difficulties in applying this provision, since some belligerents have no "depot" troop; in addition, prisoners of war may suffer from eating food to which they are not accustomed, like those prisoners who were detained by Japan. See Levie, Howard S., op cit, p126. See also, El-Far, A., op cit, p215.
- <sup>139</sup> Article 26, second paragraph.
- <sup>140</sup> Article 26, fourth paragraph.
- <sup>141</sup> Article 26, third paragraph.
- <sup>142</sup> Article 27, first paragraph.
- <sup>143</sup> Article 27, second paragraph.



<sup>144</sup> Article 28. see McCoubrey, H. op cit, p96.

<sup>145</sup> Al-Zarakashi, Badar Aldeen Ibn Muhammed, Almanthoor fil-Quaed al-Feqheeh, Kuwait, Ministry of Waqaf in Kuwait, no date, vol 2, p71.

<sup>146</sup> Al Tabarani, op cit, vol 23, p393.

<sup>147</sup> Hamidullah, op cit, p213.

<sup>148</sup> Al-Taramathi, H. No. 1491.

<sup>149</sup> Models for the letter forms and cards are set out in Annex IV to the Convention.

<sup>150</sup> Article 70.

<sup>151</sup> Article 71, first paragraph.

<sup>152</sup> Article 71, second paragraph.

<sup>153</sup> Article 71, third paragraph.

<sup>154</sup> Article 76.

<sup>155</sup> Article 72, first paragraph.

<sup>156</sup> Article 72, second paragraph.

<sup>157</sup> Article 72, last paragraph.

<sup>158</sup> Article 73, second paragraph.

<sup>159</sup> Article 73, last paragraph.

<sup>160</sup> Article 74.

<sup>161</sup> Article 77.

<sup>162</sup> Al Tabarani, op cit, vol 23, p393.

<sup>163</sup> Al-Bukhari, vol 9, p89.

<sup>164</sup> Al-Zuhaili, op cit, p414. See also, Hamidullah, op cit, p214.

<sup>165</sup> [http://www.islamqa.com/QA/5/Jurisprudence\\_and\\_Islamic\\_Rulings\(Fiqh\)/Alhudood\\_WatTa'azeerat\(Punishment\\_and\\_Judicial\\_Sentences\\_\)/Health\\_care\\_for\\_prisoners\\_in\\_Islam.12022000.5157.shtml](http://www.islamqa.com/QA/5/Jurisprudence_and_Islamic_Rulings(Fiqh)/Alhudood_WatTa'azeerat(Punishment_and_Judicial_Sentences_)/Health_care_for_prisoners_in_Islam.12022000.5157.shtml)

<sup>166</sup> Article 15.

<sup>167</sup> Article 29.

<sup>168</sup> Article 30.

<sup>169</sup> Article 31.

<sup>170</sup> Article 32 .

<sup>171</sup> Ibn Al-Arabi, op cit, vol 1, p 311. See Also, Ibn Hazm, Ali Ibn Ahmad, al-Muhala, Beirut, Dar al-Fikr, vol 5, p 414. See also, Ibn Qudamah, al-Muqni, op cit, vol 9, p30.

<sup>172</sup> Al-Jassas, Abu Bakr Ahmad Ibn Ali, Ahkam al-Quran, Cairo, al-Mutbah al-Baheih al-Masrai, 1347 A.H, vol 1, p618.

<sup>173</sup> Ibn Taymiya, Rsalt al-Qtal, op cit, p123. See also, Al-Zuhilli, Ather al-Harb, op cit, p82.

<sup>174</sup> Al Tabarani, op cit, vol 23, p393.

<sup>175</sup> Article 34.

<sup>176</sup> Article 35.

<sup>177</sup> Article 36.

<sup>178</sup> Article 37.

<sup>179</sup> Article 38.

## **Chapter Four:**

### **The End of Capture**

#### **Introduction**

The previous chapter discussed the circumstances in which prisoner of war status comes about, and the treatment accorded to such prisoners during the time of their captivity. The question now arises, by what means the captivity is terminated, in other words, what is the ultimate fate of the prisoner of war? Various possibilities exist under each system of law. Under Islamic law, the traditional alternatives were execution, release, enslavement or ransom. The first section of the chapter discusses each of these in turn, and considers whether it is still applicable. The second section examines the situations provided for in international law: escape, release on parole, death, and release and repatriation.

#### **4.1. The End of Capture in Islamic Law**

It was shown in the preceding chapters that prisoners of war are in the hands of the State and not in the hands of the individual who captures them. Therefore, anyone who injures or hurts a prisoner before a decision on his case has been made by the head of Islamic State deserves punishment.



The majority of Muslim scholars believe that the head of Islamic State has the right to choose one of four options, depending on what is in the best interests of Muslims. These options are: killing prisoners of war, releasing them, enslavement and ransom by money or exchange.<sup>1</sup>

Hanafi scholars, however, argue that the Leader of Islamic State has only three options: killing prisoners, enslaving them or releasing them by contract.<sup>2</sup> Finally, Maliki scholars give the head of Islamic State five options: killing, enslaving, releasing, ransom, and releasing with an agreement to pay *Jezyah*.<sup>3</sup>

Why do Muslim scholars hold opposing views on the fate of prisoners of war and which one of these options should the head of Islamic State take in dealing with prisoners of war? In the following section, the discussion will focus on these matters.

#### **4.1.1. Killing Prisoners of War.**

After the Battle of Badr, the problem of prisoners of war appeared, due to the fact that the Prophet (pbuh) had not received any inspiration from Allah on how to deal with prisoners of war. Therefore, the Prophet (pbuh) discussed the matter of prisoners of war with his companions Abu Bakr, Omar and Saad Ibn Muad. Some suggested keeping the prisoners captive, to be exchanged later for ransom, while Omar argued that the prisoners should be killed. The Prophet (pbuh) said, “If Al-Mutim bin Adi had been alive and interceded with me for these mean people, I would have freed them for his sake,” then the Prophet (pbuh) said that the prisoners would not be released without ransom. Either ransom would be paid, or they would be killed.<sup>4</sup>

The Prophet's decision was to obtain ransom in exchange for them. In response to the Prophet's decision, Allah revealed the first verse dealing with this subject, blaming the Prophet for taking prisoners of war for ransom. Allah says: "It is not fitting for a Prophet that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but Allah looketh to the Hereafter: And Allah is Exalted in might, Wise . Had it not been for a previous ordainment from Allah, a severe punishment would have reached you for the (ransom) that ye took" (H.Q. S8. A67, 68). The Prophet said, after the revelation of this verse, that if punishment came from the sky, nobody would be saved except Omar.<sup>5</sup>

This incident led some Muslims scholars to believe that prisoners of war must always be killed and may not be shown generosity by being released with or without ransom.<sup>6</sup> They support their opinion by mentioning some general verses, which refer to the killing of pagans, such as: Allah says, "But when the forbidden months are past, then fight and slay the Pagans wherever ye find them" (H. Q. S9. A5) and Allah says, "If ye gain the mastery over them in war, disperse, with them, those who follow them, that they may remember" (H.Q. S8.A57).

They argue that the above verses abrogate *Quranic* verses that were revealed at earlier stages, including the verse on showing generosity (releasing without ransom) or ransom. Allah says: "thereafter (is the time for) either generosity (releasing without ransom) or ransom: until the war lays down its burdens" (H. Q. S47.A4).

Moreover, they argue that it has been narrated that the Prophet (pbuh) killed Uqbah bin Abi Maeet and Al-Nadr Ibn al-Harith after they were captured at the end of the battle of Badr,

Abu Aza al-Shaer (the poet) on the Day of Uhud, and Ibn Abe al-Haqeq on the Day of Khaebar. Also, at the time of the conquest of Makkah, the Prophet ordered that Abdul Allah Ibn al-Akhatatl, Miqyas bin Subabah and Al-Huwaryrith bin Nuqayadh must be killed. These incidents in the lives of the Prophet (pbuh) and his companions prove that prisoners of war must be killed.<sup>7</sup> This opinion is held by Imam Qutada, Ibn Jurayj, Al Awfi, Al Sadi and many other Kufi scholars, and it is a famous opinion of Al-Imam Abo Hanefa.<sup>8</sup> Awzai, however, recommends that before killing prisoners of war, they should be given the opportunity to adopt Islam as an alternative to death.<sup>9</sup>

On the other hand, some scholars hold that the killing of prisoners of war is not permissible. They base their main argument on the *Quranic* verse: Allah says, “Therefore, when ye meet the Unbelievers (in fight), smite at their necks; at length, when ye have thoroughly subdued them, bind (the captives) firmly: thereafter (is the time for) either generosity (releasing without ransom) or ransom: until the war lays down its burdens” (H.Q.S47.A4).

They explain that the killing of pagans during the battle is recommended but after the capture, the verse indicates that prisoners of war should be released or ransomed. Moreover, they cite several incidents where the Prophet (pbuh) did not kill the prisoners of war but released them without ransom, or sometimes in exchange for ransom.<sup>10</sup>

Finally, they mention a tradition related to one of the Prophet’s companions, Ibn Omar, who said when a prisoner of war was brought before him to be killed, “By Allah, as for someone who is tied, I shall not kill him”.<sup>11</sup>

Al-Qurtubi states that the verse which commands the killing of pagans is abrogated by the verse which indicates that prisoners of war may be shown generosity (release without



ransom) or ransom. He concludes that it is not permissible to kill prisoners of war, but they may be released or ransomed.<sup>12</sup>

There seems to be some contradiction in the *Quran* instructions as regards the fate of prisoners of war. Is there any abrogation in these Quranic verses?

The Islamic scholars set some conditions for abrogation. For example, it must be known which is the earlier and which the later verse, there must be an inconsistency between these verses and they must deal with the same matter.

We believe, however, that in these verses, where abrogation is claimed, the claim is invalid since the verses do not deal with the same matter. The verses which command the killing of pagans, such as, “But when the forbidden months are past, then fight and slay the Pagans wherever ye find them” (H. Q. S9. A5) and Allah says: “If ye gain the mastery over them in war, disperse, with them, those who follow them, that they may remember” (H.Q. S8.A57) deal with fighting on the battlefield and are intended to encourage believers to fight bravely to win victory. Other verses, which mention the release of prisoners of war, such as, Allah says: “thereafter (is the time for) either generosity (releasing without ransom) or ransom” (H.Q.S47. A4) deal with the fate of prisoners of war after the end of battle when the enemy has been defeated. In this case the Islamic leader has two options: release without exchanging or money and ransom by exchanging or money.<sup>13</sup>

In addition, the killing of pagans is allowable in self-defence. Allah says: “And slay them wherever ye catch them, and turn them out from where they have turned you out; for persecution and oppression are worse than slaughter; but fight them not at the Sacred

Mosque, unless they (first) fight you there; but if they fight you, slay them. Such is the reward of those who suppress faith” (H.Q. S2. A191) but there is no point in killing them after they have been captured and the war is over.<sup>14</sup> So, there is no abrogation or inconsistency between these verses.

It has been narrated that Ibn Abbas considered the *Quranic* verse regarding the release of prisoners of war without ransom to be applicable and not abrogated, as proved by the act of the Prophet (pbuh) when he released the people of Makkah.<sup>15</sup>

Imam Abu Zahra stated that an Islamic leader has only two options in dealing with prisoners of war; he may release them with ransom or show kindness to them by setting them free without ransom.<sup>16</sup>

From the foregoing discussion, there is no obvious evidence that prisoners of war must be executed after capture. However, the majority of Islamic scholars hold that the Islamic leader has the right to decide on the fate of prisoners of war, even if the decision is to kill them, depending on the interest of the Islamic State.<sup>17</sup>

According to Al-Zuhaili, Muslims scholars agree that the Islamic leader has the right to choose what he considers is best for the *Umah* (Islamic Nation).<sup>18</sup>

Since there is no obvious evidence from the *Quran* that prisoners of war must be killed, and Islamic scholars derive their view that the Islamic leader may execute prisoners of war from their understanding of the events that took place at the time of the Prophet (pbuh) when he ordered his companions to kill some prisoners of war, we should consider these cases in

which the Prophet killed or ordered the killing of prisoners of war, to see what criteria should be applied in other cases.

To this end, we will study these cases individually in detail, and answer the question regarding the right of the Islamic leader to kill prisoners of war without condition.

#### **4.1.1.2. Is it Permissible to Execute Prisoners of War without condition?**

It was revealed in the holy *Quran* that the fate of prisoners of war is limited to two options, release or ransom and there is no third option such as killing them. However, the practice of the Prophet (pbuh) at the battle of Badr, at the Day of Uhud and when Makkah was conquered, was to kill some prisoners of war. So does the action of the Prophet indicate the permissibility of killing prisoners of war and is it the right of the Islamic leader to choose to kill or release the prisoners of war? Or are there conditions which must be met before prisoners of war can be killed? To answer these questions it is necessary to study these cases to find out why prisoners of war were killed.

When we study these historical events, we cannot consider them as indications of a broad permit to kill prisoners of war. The events in which prisoners of war were killed involved particular circumstances, which did not pertain to the status of prisoners of war. Let us start with the case of the battle of Badr:

At the Day of Badr the Prophet (pbuh) ordered two prisoners of war, namely, Uqbah bin



Abi Maeet and Al-Nadr Ibn al-Harith, to be executed, among seventy prisoners of war. Clearly, the motive for killing them was not because they were prisoners of war, otherwise there would have been no point in keeping the rest of the prisoners alive, as they were all the Prophet's enemies who had come to fight him, but he released some of them and ransomed some. Why were only these two prisoners killed?

Uqbah bin Abi Maeet and Al-Nadr Ibn al-Harith were treated as war criminals since they had been brutal and cruel to the Prophet and his companions. According to Ibn Hisham, when the Prophet ordered the execution of Uqbah bin Abi Maeet, he asked the Prophet 'Do you want to kill only me among the Quraish'? The Prophet (pbuh) said 'Yes indeed'. Then the Prophet said to the people 'Do you know what this man did to me? He came to me while I was sitting behind al-Maqam and put his foot on my neck and pressed very hard until I thought that my eyes would come out of my head. On one occasion, he threw a sheep's amnion on my head while I was prostrating and it was Fatima (the Prophet's daughter) who cleaned my head. Further, he came one day and strangled me very hard with his dress until Abu Bakr came running and shoved him from me saying: "How dare you! Do you want to kill a man whose fault is saying that his lord is Allah?"'.<sup>19</sup>

It has been related that Uqbah bin Abi Maeet was a neighbour of the Prophet (pbuh). One day he invited the Prophet to his house. When the food was served, the Prophet (pbuh) refused to eat it unless Uqbah pronounced the Alshahadh, (meaning he accepted Islam), and he did. Later, Ubay Ibn Khlaf, a friend of Uqbah, blamed him for converting to Islam and leaving the belief of his fathers, but Uqbah said, "He refused to eat my food and I was shy and did what he asked me", then Ubay asked him to go to Muhammad and spit in his face and put his foot on his neck and he did. Then the Prophet said to him: "Any time I find you

out of Makkah, I will kill you”.<sup>20</sup>

Of *Uqbah's* behaviour, Allah says: " The Day that the wrong-doer will bite at his hands, he will say, "Oh! Would that I had taken a (straight) path with the Messenger! Ah! Woe is me! Would that I had never taken such a one for a friend! He did lead me astray from the Message (of Allah) after it had come to me! Ah! The Satan is but a traitor to man!" (H.Q. S25.A27, 29). These are the crimes of Uqbah and that is why the Prophet (pbuh) ordered him to be executed.

In Al-Nadr Ibn al-Harith's case, he was executed because whenever the Prophet preached or recited the *Quran* to the people, Al-Nadr would come after him and start telling them fables and the history of the Persian Kings. He would say, 'Surely Muhammad's tales are not better than mine, they are but ancient tales that were written for him'.<sup>21</sup> Then Allah revealed the following verse: Allah says: 'And they say: "Tales of the ancients, which he has caused to be written: and they are dictated before him morning and evening." (H.Q. S25.A5) and He says: "When to him are rehearsed Our Signs, "Tales of the ancients", he cries!" (H.Q. S68.A15).

At the Day of Uhud, one prisoner of war was killed, namely, Abu Aza al-Shaer (the poet). In this case, Abo Aza was not killed solely because he was a prisoner of war, but for breach of promise. He had been captured on the Day of Badr and released on condition that he gave his word not to fight the Muslims again, but he broke his word.<sup>22</sup> As soon as he gained his freedom, he showed his willingness to fight the Muslims again and went with the Quraish to fight the Muslims on the Day of Uhud. Then he fell into capture again and when the Prophet ordered him to be killed, he asked the Prophet again to release him but the

Prophet (pbuh) refused and said, ‘A believer is not misled in the same way twice’.<sup>23</sup>

In the case of the Banu Quraiza, they were killed because they breached a treaty with the Prophet. When the tribes and parties encircled al-Madinah (the Prophet’s city) they supported the Quraish tribe against the Prophet and they declared war against the Prophet (pbuh) and his companions. This event almost led to the collapse of the Islamic State. It is notable that the judgment of their case depended on the decision of an arbitrator, Saad Ibn Muath (a previous ally of the Banu Quraiza) who had been accepted by both sides in the conflict.<sup>24</sup> This is narrated on the authority of Abu Saaed al-Khudri who said that, “The people of Quraiza surrendered accepting the decision of Saad Ibn Muath about them. Accordingly, the Messenger of Allah (may peace be upon him) sent for Saad who came to him riding a donkey. When he approached the mosque, the Messenger of Allah (may peace be upon him) said to the Ansar: “Stand up to receive your chieftain”. Then he said (to Saad) “These people have surrendered accepting your decision”. He (Saad) said “You will kill their fighters and capture their women and children”. (Hearing this), the Prophet (pbuh) said: “You have adjudged by the command of God”.<sup>25</sup>

During the conquest of Makkah, the Prophet (pbuh) commanded his leaders, when he ordered them to enter the city, not to kill anyone unless they fought them. At the same time, the Prophet specified the names of some who were to be executed. When we study their cases we find that the Prophet dealt with them as criminals of war and he did not kill them because of war or because they were prisoners of war. Abdul Allah Ibn al-Akhatatli, who was killed by Abo Barzh al-Aslami, was executed for several reasons. First, he was a Muslim and the Prophet sent him to collect *al-Zakkah* from rich Muslims. While he was travelling, he stopped for a rest and asked his servant to prepare food for him. When he



woke up, he found the food not ready, so he killed his servant and apostatised from Islam. Also, he owned as slaves two showgirls, who lampooned the Prophet (pbuh) and Islam in song. Accordingly, he was treated as a criminal of war and the decision to execute him was issued before his arrest.<sup>26</sup>

In the case of Miqyas bin Subabah, the Prophet (pbuh) allowed his companions, when they found him, to kill him, and he was killed by Nameelah Bin Abdul Allah al-Kanani. Why was he killed? He was killed because he had killed a man who had killed his brother by mistake. The Prophet asked the family of the killer to give Miqyas (blood money) for the erroneous killing. Miqyas took the money, but waited for his chance and killed the man who had killed his brother, and apostatised.<sup>27</sup>

Al-Huwaryrith bin Nuqayadh, who was killed by Ail Ibn Abe Taleb, was killed because he was brutal and cruel to the Prophet and his family. While the Prophet was at Makkah, he kept hurting him. Also, he hurt the daughters of the Prophet (pbuh). When they were travelling towards al-Madenah, he hid then he hit the pack animals until they fell to the ground.<sup>28</sup>

It is clear from what has been mentioned above, that those whom the Prophet ordered to be killed, were not killed because they were prisoners of war, but for crimes committed before their arrest. The Prophet (pbuh) did not announce that prisoners of war should be killed, but he ordered specific persons who had committed crimes for which they were personally responsible, to be executed.

Moreover, the Prophet (pbuh) forbade the killing of prisoners of war when he entered

Makkah in victory. He said, “Do not finish off the wounded, do not follow deserters, do not kill prisoners and if someone locks his house on him, so he is safe”.<sup>29</sup>

Therefore, since the Prophet ordered prisoners of war not to be killed, we have to agree that Islam does not allow a POW to be killed unless has acted against the rules of war. The acts of the Prophet (pbuh) interpret the verse, “thereafter (is the time for) either generosity or ransom”.

Al-Hasan Ibn Muhammad al-Tamemi states that the objection to killing of prisoners of war is a matter accepted by the most of the Prophet’s companions.<sup>30</sup> According to Haykal, the majority of contemporary Islamic scholars hold the view that killing a prisoner of war is forbidden unless in a particular cases.<sup>31</sup> Dr al Ghunaimi states that, “all the events in which the Prophet ordered the killing of prisoners of war are limited, and if we analyse them one by one, we find that the killing was not a punishment for the prisoners of war, but for crimes committed by these prisoners, before the state of war, against the Prophet and Islam”.<sup>32</sup>

It can be concluded that, in Islam, it is not permissible to kill prisoners of war unless they had committed crimes before falling into capture, for which they deserved to be executed. This is consistent with contemporary international law. Article 85 of the 1949 Geneva Convention, which reads: “Prisoners of war prosecuted under the law of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention”. This article does not prevent the prosecution of prisoners of war for crimes which they had committed before capture, even if the punishment was execution, but it requires consideration, in trial and punishment, of the humane principles which are

expressed in the convention, namely, not to torture or to hurt in honour.

#### **4.1.2. (Al-Man) The Releasing of Prisoners of war without ransom.**

*Al-man* in literature means doing someone a favour, a kind act. In the technical sense it means setting prisoners of war free, without ransom.

The release of prisoners of war without ransom is a legitimate option in Islamic Law. In the Holy *Quran* Allah says: “thereafter (is the time for) either generosity (releasing without ransom) or ransom: until the war lays down its burdens” (H. Q. S47.A4).

This verse establishes the release of prisoners of war at the end of hostilities without ransom, when it gives the Islamic leader the right to choose to release prisoners of war with or without ransom (by exchange, money or work). In this regard Ibn Hayan states “It is permissible, after the fall of the enemy into the hands of the Muslims, to set them free, for nothing (showing generosity), or to take a ransom”.<sup>33</sup> It should be noticed that the verse mentions release without ransom first, and then in the second place with ransom. It does not mention killing or enslaving prisoners of war. This shows the importance of release.<sup>34</sup>

On the Day of Badr, the Prophet said, “If *Al-Mutim* bin Adi had been alive and interceded with me for these filthy people; I would definitely have forgiven them for his sake”.<sup>35</sup> This tradition establishes from the *Sunna* the permissibility of releasing prisoners of war without ransom.

Also, it has been reported that the Prophet (pbuh) on numerous occasions released many prisoners of war without ransom. For instance, it has been narrated on the authority of Abu



Huraira that: “The Messenger of Allah (pbuh) sent some horsemen to Najd. They captured a man from the tribe of Banu Hanifa, called Thumamh bin Uthal. He was the chief of the people of Yamama. He was kept for three days, then the Prophet set him free for nothing”.<sup>36</sup>

Imam Muslim narrated from Anas about eighty pagans from Makkah who descended the mountain at the break of day to try to kill the Prophet and his companions. They were captured, and then the Prophet set them free. Regarding this event, Allah says: “And it is He Who has restrained their hands from you and your hands from them in the valley of Makkah, after that He gave you the victory over them. And Allah sees well all that ye do” (H.Q. S48.A24).<sup>37</sup>

Also, the Prophet set free Abulas Ibn al-Rabea, the husband of his daughter Zaynab. It has been narrated that, when the people of Makkah sent about ransoming their prisoners, Zaynab sent some property to ransom Abulas, sending among it a necklace of hers, which had formerly belonged to Khadijah, who had given it to her when she married Abulas. When the Apostle of Allah (pbuh) saw it, he felt great tenderness about it and said: “If you consider that you should free her prisoner for her and return to her what belongs to her, (it will be well).” They agreed and set him free.<sup>38</sup>

The Prophet (pbuh) released the people of Makkah, when he captured them. He asked them, “What you think I am going to do with you?” They said, “You are a dear brother and the son of the dearest brother”, and then he said, “Go, you are free”.<sup>39</sup> Consequently, showing generosity and releasing the prisoners of war for free is the option, which the Prophet (pbuh) applied in all his wars. He did not depart from this option unless there was a

particular cause in individual cases, as discussed in the previous section.<sup>40</sup>

This behaviour of the Prophet (pbuh) is in concord with the general demand in the Holy *Quran* for forgiveness and kindness. Allah says: “let them forgive and overlook, do you not wish that Allah should forgive you? For Allah is Oft- Forgiving, Most Merciful” (H. Q. S24. A22). In this verse, obtaining forgiveness from God is conditional on acting with gentleness in all behaviour, which includes dealing with prisoners of war. Allah says: “who restrain anger, and pardon (all) men for Allah loves those who do good” (H. Q. S3. A134). The word ‘all men’ in this verse includes prisoners of war, and it is impossible to exclude them from forgiveness.

This led the majority of Muslim scholars, Imam Malik, Al-Shafi, Ahmad Ibn Hanbal and others, to agree on the permissibility of releasing the prisoners of war and the right of an Islamic leader to release any prisoner for nothing.<sup>41</sup> On the other hand, Imam Abo Hanafia held another view and argued that it is not permissible to release prisoners of war. He argued that to release an enemy combatant to his people is equivalent to supporting the enemy, as the freed prisoners may fight Muslims on a later occasion. Also, he claimed that the *Quranic* verse which states “thereafter (is the time for) either generosity (releasing without ransom) or ransom: until the war lays down its burdens” (H. Q. S47. A4) is abrogated by the following verse: “But when the forbidden months are past, then fight and slay the Pagans wherever ye find them” (H. Q. S9. A5). He believed that this verse was revealed at a later stage. Finally, he cited the response to the act of the Prophet (pbuh) when he released the prisoners of war on the Day of *Badr*, saying, it was the Prophet’s decision and Allah had blamed him for it. Allah says: “It is not fitting from a Prophet that he should have prisoners of war” (H. Q. S8. A67). It is claimed that the prisoners were released by the

Prophet before the abrogation and before the revelation of the verse which commanded all unbelievers to be killed, like Abo Aza al-Shear, the Prophet (pbuh) released him but when he captured him again after the revelation of this verse, he ordered him to be killed.<sup>42</sup>

When we investigate the proofs used by Abo Hanafai, we find that there is no abrogation in the verses, as he claimed, since there is no contradiction between the two verses, which is an essential condition of abrogation, in view of the fact that each verse deals with a different situation, as discussed in the previous section. Ibn Hajar commented, “Abo Obeed said: there is no abrogation in these verses but all of them are applicable and that is confirmed by the actions of the Prophet (pbuh) when he killed some prisoners of war and ransomed some and released some”.<sup>43</sup> Furthermore, after the revelation of the verse which commanded all pagans to be killed, the Prophet (pbuh) released the Quraish warriors at the time of the al-Hudaibiya treaty and he also granted freedom to the Quraish during the conquest of Makkah.<sup>44</sup>

Moreover, al-Hanafai hold the view that it is permissible to enslave prisoners of war and take *al-Jazeh* (tribute) from them, but this contradicts with the opinion that this verse commands the killing of prisoners of war.

Also, regarding the argument that to release an enemy combatant to his people is to support the enemy against the Muslims, we can answer this argument in two ways. First, al-Hanfai reached this conclusion by applying *Qiyas* (analogical deduction), and it is agreed among the Islamic learned that it is not allowed to employ *Qiyas* as long as there a ruling in a text from the *Quran* or the *Sunna*. In the prisoners of war case we have a *Quranic* verse, “thereafter (is the time for) either generosity (releasing without ransom) or ransom”, and



the act of the Prophet (pbuh) when he released them. Second, it is permissible for the head of Islamic State to give an unbeliever money to predispose him to Islam, even though this may be considered as supporting the unbeliever.

From what has been discussed, it can be understood that it is permissible to release unbelieving prisoners of war and that the verse which mentioned the release and ransom of prisoners of war is not abrogated. However, scholars who hold the view that the Islamic leader is allowed to release prisoners of war, argue that the head of Islamic State has the right to do so unconditionally or on certain conditions. For example, the head of Islamic State may stipulate that the prisoner must not fight Muslims again, and if the prisoner accepts this condition and then breaks it, he will deserve any punishment. To support their argument, they refer to two cases. The first case is the case of Thumamh. The Prophet (pbuh) before releasing Thumamh, stipulated that he must stop sending food to the people of Makkah, and he did. The second case is the case of Abo Aza al-Shear. When he was captured on the Day of Badr, the Prophet (pbuh) released him after exacting a promise from him not to oppose the Muslims in his poetry. Then, on the Day of Uhud, Abu Aza came with the unbelievers and incited them, in his poetry, to fight the Muslims. When he was recaptured, he said, 'O Muhammad, I just came with Quraish unwillingly, and I have many daughters, so release me'. The Prophet refused to release him and said, 'You will say, I laughed at Muhammad two times', and then he ordered him to be killed.<sup>45</sup> Thus, it is legitimate in Islamic Law for the head of Islamic State to release prisoners of war without or with conditions, depending on the interest of the Islamic nation.

### **4.1.3. Enslavement.**

This section explains the circumstances under which slavery existed in the Islamic State, and outlines the Islamic Law regarding treatment and emancipation of slaves.

#### **4.1.3.1. The historical background of Enslavement**

The practice of enslaving prisoners of war dates to ancient times. Slaves were treated differently in ancient times depending upon what their purpose was. Numerous millennia ago, the Egyptian and Mesopotamian civilizations started to make slaves from prisoners of war rather than killing them, since this practice was more beneficial to the captors than killing them. Levie states, “This change in practice was based on economic, rather than humanitarian, considerations. The agriculture economy which was just beginning to develop in that area required manpower to work in the fields”.<sup>46</sup>

There were many different ways in which a person could become a slave in ancient period. They might be born into slavery as the child of a slave. They might be taken prisoner if their city was attacked in one of the many battles which took place during these times. They might be exposed as an infant, or if a family needed money, they might sell one of the children into slavery. Another way to become a slave was to be convicted of a criminal charge such as stealing, evasion of taxes or military service, or falling into an unpaid debt.<sup>47</sup>

The ancient Hebrews also used slaves, but they were required by religious law to free slaves of their own nationality at certain fixed times. Foreign slaves were excluded from the

benefit of that kind of arrangement.<sup>48</sup>

In Greek civilization, the number of slaves increased due to the increase in war casualties. The losers in a Greek war had to face the fate of enslavement. Cuffel states that, “it is not surprising that the enslavement of those defeated in a war and of the captives of raids and piracy was the common practice”.<sup>49</sup> Slavery in Greek logic was not considered as morally objectionable and slaves were treated without mercy. Cuffel confirmed that, “the slave was regarded as a sort of extension of the master’s person, an instrument, trained to obedience by force if necessary. The relationship of master to slave was, of course, tyrannical, and, in that relationship, friendship between the two was out of the question”.<sup>50</sup>

As Rome expanded and conquered its foreign neighbours, the slave population grew. The practice of slavery became more common, especially around the city of Rome.<sup>51</sup> The status of the slave was no different from that at the time of the Greeks as slaves’ rights were minimal. According to some writers, a slave was not a person but a property, or a thing of its master, and the slave had no lawful place other than to benefit the master.<sup>52</sup> Slaves worked not only as domestic servants, but also as factory workers, shopkeepers, mineworkers and farm workers.<sup>53</sup>

With the establishment of Christianity, the slavery system was recognized, which tended to improve the conditions but did not eliminate the practice of slavery.<sup>54</sup> According to Siddiqi “In the Christian Roman Empire, slavery was recognized as a natural institution and the code fixed the maximum price of slave in accordance with the training and profession of the incumbent”.<sup>55</sup>



The institution of slavery in pre-Islam Arabic communities was no different from that in preceding civilizations. Khadduri confirmed that, “Enslavement by war is an ancient custom which existed in the ancient East and was practiced in pre-Islamic Arabia”.<sup>56</sup>

When Islam emerged in the 7th century, it recognized the institution of slavery from the beginning, as it was commonly practised, and had become an essential constituent of the Arab society.<sup>57</sup> Islam did not try to eradicate the institution of slavery, because it would collide with the customs of the people at that time and create immense social and economic problems. There would have been great poverty among newly-released slaves, who had been dependant on various families. Moreover, an emancipation movement might have inatied rioting and crime among the slaves.<sup>58</sup>

On the other hand, Islam attempted gradually to eliminate the institution of slavery. First, it prohibited certain sources of slavery, which were practiced in ancient times. Lewis states, “It was made unlawful for a freeman to sell himself or his children into slavery, and it was no longer permitted for freemen to be enslaved for either debt or crime”.<sup>59</sup> The only sources of slavery remaining were the enslavement of those who had been taken prisoners in a just war, waged for the defence of Islam, or being born to slave parents. A complete prohibition on slavery would have put Muslims at a disadvantage, because if their enemies refused to follow the same course, Muslim prisoners would become slaves, while pagan prisoners would be freed.<sup>60</sup>

As a second step, Islam encouraged people in different ways to set their slaves free for the sake of God. It considered the emancipation of slaves as a great deed of piety, which deserved a reward of Heaven.<sup>61</sup> In the Holy *Quran* Allah says, “But he hath made no haste

on the path that is steep. And what will explain to thee the path that is steep, (It is:) freeing the bondman” (H. Q. S90. A11-13). Furthermore, the Prophet (pbuh) urged Muslims to liberate slaves, so they would be amply rewarded in paradise. Freeing a slave by one's own free will, was declared to be an act of great value<sup>62</sup>, so much so that it was said that every limb of the man who manumits a slave will be protected from hell-fire, for the sake of the limbs of the slave freed by him.<sup>63</sup>

#### 4.1.3.2. The treatment of slaves in Islam

On the subject of the treatment of slaves, Islam urged its followers to treat them well, and to provide them with adequate food, housing and clothes, not to charge them with something above their ability and not to harm them, even in the way of talk. In this regard the Prophet (pbuh) said, “Slaves are your brothers, so feed them the like of what you eat, clothe them with the like of your clothes, and do not oblige them to do what they cannot do, and if you do, help them”.<sup>64</sup>

It was considered in Islam hateful to look down upon them and say: “my slave” or “my slave girl”. It is narrated that the Prophet (pbuh) said, “No one should say (to his slave) “feed or drink your lord” but he should say “your master”, and one should not say, “my slave” (*Abdi*) or my “slave girl” (*Amati*) but should say “my lad” (*Fatai*), “my lass” (*Fatati*) and “my boy” (*Ghulami*)”.<sup>65</sup>

Moreover, the Prophet (pbuh) ordered a slave to be forgiven by his or her master for any mistake. It is narrated that a man came to the Prophet (pbuh) and asked him, “How many times should I forgive my servant if he makes a mistake?” The Prophet replied, “Forgive

him seventy times every day”. In this tradition, the Prophet (pbuh) meant that the master should forgive his servants as many times as they made a mistake. Also, the Prophet (pbuh) stopped Abo Mssaud when he saw him beating his slave and said, “Know that, Abo Masaud, God has more power over you than you have over your servant”.<sup>66</sup>

#### 4.1.3.3. Enslavement of Prisoners of war in Islam

Islamic jurists were affected by the environment at that time and argued that it is permissible to enslave prisoners of war. They supported their view by referring to this *Quranic* verse. Allah says, “Therefore, when ye meet the Unbelievers (in fight), smite at their necks; at length, when ye have thoroughly subdued them, bind (the captives) firmly: thereafter (is the time for) either generosity (releasing without ransom) or ransom” (H. Q.S47. A4). They interpreted the word *bind firmly* in the verse as meaning enslavement and argue that this was supported by a narration from Ibn Abas. He said, “It is not fitting for a Prophet that he should have prisoners of war”. That was on the Day of Badr when the Muslims were few in number, but when they became strong. Allah revealed, “thereafter (is the time for) either generosity or ransom” so the Prophet was authorized to decide to kill them, enslave them or ransom them.<sup>67</sup> They argued that the Prophet (pbuh) enslaved some Arabs who were captured in war namely, the tribes of Hauazen and Banu Al-Mustalq (Arab tribes). Moreover, Abu Bakr (the first Caliph) and Ali (the fourth caliph) enslaved the Banu Najeah who were a sub-tribe of the Quraish.<sup>68</sup> They pointed out the practice of the Prophets’ companions, during their conflict with Romans and Majoos, of enslaving many prisoners of war.



In examining these arguments we find that, regarding the verse, which they cited, it does not mention the enslaving of prisoners of war, either explicitly or implicitly. The words *bind firmly* in the verse refer to captivity and capture does not require enslavement. The verse gives two choices after the capture: generosity (release without ransom) or ransom.<sup>69</sup> Zuhaili confirmed, “This verse rejects the enslaving of prisoners of war in an implicit way”.<sup>70</sup>

Imam Abu-Zahra states that, “Islamic leaders are authorized, in dealing with the fate of prisoners of war, to choose from two options and there is no third alternative, as the *Quranic* verse stated “generosity (releasing without ransom) or ransom” and it (the verse) did not declare enslavement, which is the third option. Consequently, it is obvious in the Holy *Quran* there is no permission for enslavement, or rather, there is a denial of it, and even if it is not explicit, it is understood”.<sup>71</sup>

Regarding the tradition of the Prophet (pbuh) and his companions in slaving prisoners of war, we could argue that the practice of Prophet (pbuh) and his companions was an attempt to face the existing position and general customs of war at that time. Applying the principle of equal treatment, it is not reasonable that Muslims should have applied the general principle of generosity or ransom in dealing with prisoners of war in all cases when, at the same time, their enemies were enslaving Muslim prisoners of war.

Therefore, the practice of the Prophet (pbuh) was sometimes to release prisoners of war, sometimes to ransom them for money or in exchange for Muslim prisoners, and in some cases he enslaved prisoners of war to face an existing situation, which he could not deal

with in any other way.<sup>72</sup> Omar (the second Caliph) showed that he was not in favour of enslaving prisoners of war. According to Khudduri Omar, “He seems to have been unfavourable even to non-Arab enslavement and was more interested in having the population of the occupied territories of Syria and Iraq work and pay *kharaj* than be enslaved”.<sup>73</sup>

According to the majority of Islamic scholars, Islam refused the institution of slavery completely when Islam banned all kinds of slavery, except slavery for God. The only *Quranic* text that regulates the fate of prisoners of war, is this verse (generosity or ransom). Dr Ahmad Shlabi states that, “The majority of contemporary scholars are inclined to adhere to this *Quranic* text as a fundamental rule in prisoners of war”.<sup>74</sup>

In brief, enslavement was recognized in Islam on the basis of reciprocity with the other nations, and by doing that, it is believed by some Islamic scholars that the number of slaves would decrease. Zuhaili argues that, “If the adversaries of Muslims enslaved the Muslim prisoners without Muslims acting in the same way, the enemy would carry on doing that, and this would be a cause of the increase of the number of slaves in the world, without a limitation”.<sup>75</sup> Ultimately, the Islamic leader has the right to conclude mutual or international agreements in according with which prisoners of war are protected from being enslaved.<sup>76</sup>

#### **4.1.3.4. Ways of freeing slaves in Islam**

As indicated above, Islam recognized the institution of slavery and adopted a gradual way

to eliminate it. Firstly, it prohibited most sources of slavery, so that the only form of slavery left in Islamic society was the enslavement of prisoners of war who were captured in a just war. In addition, by prohibiting all kinds of war, except a just war (*Jihad*) waged in the defence of Islam, it limited even that source of slavery.

Secondly, Islam created numerous ways in which slaves could get their liberty. These ways are mentioned in the Holy *Quran*, in the books of the Prophet's tradition and in the books of Islamic scholars. The following are some of them:

1. As a penance for oath breaking. If a Muslim swore on oath to obligate himself to something and he could not meet this obligation, then he had to liberate a slave as penance. Allah says, "Allah will not call you to account for what is void in your oaths, but He will call you to account for your deliberate oaths: for expiation, feed ten indigent persons, on a scale of the average for the food of your families; or clothe them; or give a slave his freedom" (H.Q. S5.A89).

2. Penance for *Zihar*. It was a custom among Arab, to divorce their wives indirectly, by saying something like, "You are like my mother". If a Muslim said that to his wife, he had to free a slave as a penance, before resuming relations with her. Allah says, "But those who pronounce the word *Zihar* to their wives, then wish to go back on the words they uttered, (it is ordained that such a one) should free a slave before they touch each other: thus are ye admonished to perform: and Allah is well-acquainted with (all) that ye do" (H.Q.S58.A3).

3. Penance for manslaughter. Killing by mistake may happen, and it is not enough in Islam for the killer just to pay compensation to the family of the person who was killed



unintentionally, but a slave must be liberated as well. Allah says, “Never should a believer kill a believer, except by mistake. And whoever kills a believer by mistake, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely” (H.Q.S4.A92). Accordingly, the family received compensation and at the same time the Islamic society was compensated as a free man was added to it. Therefore, both the family and the society were compensated.<sup>77</sup>

4. Penance for breaking the fast of Ramadan. All adult Muslims have to fast during the Holy month of Ramadan, unless they are exempt (for example, by reason of illness), and if someone broke his fast without a legitimate excuse, he or she had to liberate a slave as a penance for that fault.

5. Slaves' right in the public treasury. A slave has the right to obtain some money from the public treasury, as slaves are one of eight categories entitled to get money from *al-Zakkah*. Allah says, “Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt; in the Cause of Allah; and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom” (H. Q. S9. A60). According to Amer, a slave has the right to go to the government to collect some money, which would allow him to purchase his liberty.<sup>78</sup> Siddiqi confirmed that, “sums should be advanced to the slave from the public treasury to purchase their liberty”.<sup>79</sup> Thus, the State which, having fought its opponents, had captured them and made them slaves, was now obliged to liberate them with its money (treasury), because the objective which was the cause of their enslavement had ended and they should return to their original condition, which is freedom.<sup>80</sup>

6. The law of *mukatibat* (manumission). Allah ordains that slaves should be allowed to purchase their liberty<sup>81</sup> by the manumission (*mukatibat*) approach, which provides very easy access for the slaves to the gateway to freedom. Every slave who was capable of supporting himself was allowed by law to free himself, provided that he either paid a certain amount of money to his master or carried out certain errands for him. Allah says, “And if any of your slaves ask for a deed in writing (for emancipation), give them such a deed if ye know any good in them: yea, give them something yourselves out of the means which Allah has given to you” (H. Q. S24. A33).

7. *Al-Tadbeer*. This means that a slave was liberated after the death of his master. This could happen if the master indicated that he would recommend the release of his slave after his death, whether he pronounced that implicitly or explicitly. Therefore, Islamic Law forbids a master from disposing of his slave, whether by sale or gift, or any act, which could prevent him from attaining his liberty.<sup>82</sup>

8. A slave girl became free if she had a child by her master. It is permissible in Islam for the master to have sexual relations with his slave girl, and if she has a child by him, she is called in Arabic (*Um Walad*). Such a girl will get her complete liberty after the death of her master. Meanwhile, the master no longer has the right to dispose of her, whether by sale or gift, and the State has the right to stop him if he tries, as happened in the time of Omar (the second Caliph). Moreover, her child is a free person as he follows the state of the father. Siddiqi confirmed that, “the child of a slave woman should follow the condition of the father, while the mother becomes free at his death”.<sup>83</sup>

In this regard Dr Wafe stated, “It appears that sleeping together, the master and his slave

girl, leads, in Islamic Law, to liberty of the slave girl and all her lineage until the day of judgment, and this is likely to be the reason why Islam allowed the master to have sexual relations with his slave girl, to facilitate liberation of many slave girls”.<sup>84</sup> Furthermore, Amer observed “that the guarantee which was given to the slave girl is more than what was given to the wife herself, as the husband could separate from his wife without any condition, while he could not sell his slave girl when she became pregnant and he had to keep her and look after her”.<sup>85</sup>

#### **4.1.4. (Al-Fida) The ransom:**

*Al-Fida* is an Arabic word which means to “rescue” someone by paying money or exchanging man for man. In the Arabic language there are two related words, *Fida* and *Mufadah*. The first word means releasing a prisoner in exchange for money, while the second means releasing a prisoner in exchange for one held prisoner by the other side.<sup>86</sup> In a technical sense, it means releasing prisoners of war in exchange for money, for prisoners (prisoner by prisoner) or for work.<sup>87</sup> Allah says, “After this it is ye, the same people, who slay among yourselves, and banish a party of you from their homes; assist (their enemies) against them, in guilt and transgression; and if they come to you as captives, ye ransom them, though it was not lawful for you to banish them.” (H. Q. S2. A85).

The majority of Islamic scholars agree that the Islamic leader has the authority to release prisoners in exchange for money or work, or to redeem Muslim prisoners. They argue that the permissibility of releasing prisoners of war by ransom is established in the Holy *Quran* and the practice of the Prophet (pbuh).



In the Holy *Quran* Allah says, “Therefore, when ye meet the Unbelievers (in fight), smite at their necks; at length, when ye have thoroughly subdued them, bind (the captives) firmly: thereafter (is the time for) either generosity (releasing without ransom) or ransom” (H. Q. S47. A4). This verse indicates that Muslim leaders should release prisoners of war at the end of the hostilities, with or without ransom, depending on the circumstances. Ibn Jarer states that “this verse gives Muslims two ways in dealing with their captives, they may set them free without ransom, or they may release them in exchange for something in return”.<sup>88</sup>

In the *Sunna* of the Prophet (pbuh) the first event in which ransom (exchange) was applied concerned the prisoners of the company (*Sareah*) of Abdul Allah Ibn Gahish. Two prisoners fell into the hands of Muslims and the Prophet (pbuh) released them in exchange for the release of two Muslim prisoners who were being kept as captives of the Quraish. Also, on the Day of Badr, the Prophet (pbuh) released most of the prisoners of war for a monetary ransom, and ransomed others in exchange for Muslim prisoners. Moreover, the Prophet (pbuh) ransomed a Muslim who was in the hands of the people of Makkah in exchange for a woman who was kept as a prisoner.<sup>89</sup> The Prophet released the prisoners and the captives of the Battle of Hunayn, having received property from the Hawazin tribe as a ransom.<sup>90</sup>

However, this view does not remain unchallenged. Some of the Hanafi School holds another view, that the Islamic leader has no right to take a ransom from prisoners of war.<sup>91</sup> They support their view by referring to the verses which command the killing of all unbelievers, such as, Allah says: “then fight and slay the Pagans wherever ye find them” (H. Q. S9. A5). And Allah says: “when ye meet the Unbelievers (in fight), smite at their

necks; at length” (H. Q. S47. A4). They claim that the killing of pagans is the duty of Muslims and it is not legitimate to discontinue it unless the objective of it, i.e. the dominance of Islam, has been achieved. They also argue that these verses abrogate the verse which allowed Muslims to take ransom from prisoners of war; so all unbelievers must be killed, apart from those in exempt categories, such as women and children.

They also assert that the release of prisoners of war supports the enemy by restoring to them combatants who may fight against the Muslims again. Furthermore, they note that Allah blamed the Prophet (pbuh) for taking ransom from prisoners of war on the Day of Badr, in the verse, Allah says: “It is not fitting for a Prophet that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but Allah looketh to the Hereafter: And Allah is Exalted in might, Wise . Had it not been for a previous ordainment from Allah, a severe punishment would have reached you for the (ransom) that ye took” (H. Q. S8. A68).

After the revelation of this verse, the Prophet said, ‘if punishment came from the sky, no one would be saved except Omar’, as Omar had recommended that all prisoners of war on the Day of Badr be killed.

In examining these evidences, which the Hanafi school cite to support their view that prisoners of war must be killed, the same arguments may be made as were pointed out above.<sup>92</sup>

Regarding the argument that Allah blamed the Prophet (pbuh) for keeping prisoners of war for ransom on the Day of Badr, we would reply by saying that the blame in that verse was not aimed at the Prophet (pbuh) but at his companions who were undertaking war.

According to Al-Nasaborry, “It is not fitting for a Prophet” means it is not fitting for his companions. The verse was directed towards the group and not an individual (the Prophet). The Prophet (pbuh) did not order the enemy to be taken on the battlefield and he did not want the temporal goods of this world, but it was the act of the people who were waging the war (his companions).<sup>93</sup> Similarly Al-Qurtubi argued that, “the Prophet did not command that the enemy fighters be kept as prisoners in the time of war and he did not want the possessions of this world, but his companions who undertook the war did. This is the view of the majority of interpreters”.<sup>94</sup> Furthermore, Sayyid Qutb declared that the blame in this verse is not because of taking the ransom, but because the Muslims took prisoners of war before they had defeated (destroyed) their enemy by killing them on the battlefield; after that it would be the time to take prisoners. He continued by saying that the reason for that is clear; the obliteration of aggressors against Islam is the first objective of fighting, especially as the number of Muslims was few and their enemies were many and killing one of the enemy commandants would have been worth a lot in the balance of power.<sup>95</sup>

From what is stated above, it is apparent that blame in the verse was not because a ransom was taken, but was because the Muslims who undertook the war stopped before they had weakened the enemy.

In conclusion, it is clear that the view of the majority of Muslim scholars, according to whom Islamic leaders have the right to ransom prisoners of war, is the preferable view. It is supported by the *Quranic* verse and it is consistent with the acts of the Prophet (pbuh). However, the scholars who hold this view refer to three forms of ransom and consider that it is up to the Islamic leader to choose one of them, depending on the interest of the Islamic nation.



#### **4.1.4.1. By exchanging:**

The first decision that the Prophet (pbuh) issued on the subject of prisoners of war, referred to two prisoners who fell into the hands of the Muslims (the company of Abdul Allah Ibn Gahish) namely, Othman Ibn Abdul Allah and Alhakam Ibn Kesan. The Quraish sent to the Prophet asking him to ransom the two prisoners, but the Prophet refused to release them in exchange for money and said, “We will not release them until you release our prisoners,” because he was afraid that the Quraish might kill the two Muslim prisoners who were in their hands, namely, Saad Ibn Abe Wqas and Utbah Ibn Qazwan. Therefore, the two prisoners were remained in custody until the two Muslims were released. In addition, the Prophet (pbuh) ransomed two Muslim men who were kept as prisoners in the hands of Thaqif, in exchange for a man from Bane Aqeel.<sup>96</sup> Furthermore, on the Day of Badr, the Prophet (pbuh) released Saad Ibn al-Nuaman, an old man, who was captured while he was visiting Makkah, in exchange for Amr Ibn Abe Sufan, a young fighter, who was captured on the Day of Badr, when his father refused to pay money.

Moreover, it has been narrated that the Prophet (pbuh) ransomed some Muslims who were in the hands of the people of Makkah in exchange for a woman who was kept as a prisoner.<sup>97</sup>

In this regard, Islamic scholars understand, from these Prophetic traditions, that the exchange of enemy prisoners of war in return for Muslims prisoners of war is legitimate in Islamic Law, regardless of gender, strength and age or even number, as the Prophet (pbuh)

exchanged an unbelieving woman prisoner of war for some Muslim prisoners of war. Also, it is not a condition of the exchange that there is equivalence in number or the strength, as the actions of the Prophet show that it is allowable to exchange one prisoner for one, two or three others, depending on the benefit of Islamic nation.<sup>98</sup>

Conversely, some of the Hanafai argue against exchanging prisoners of war, saying that the release of a Muslim prisoner is an individual benefit for the released prisoner, while the release of an enemy POW is contrary to the interest of the whole Islamic nation, as these released prisoners may fight against them. Moreover, those who hold the view that the exchange of prisoners of war is allowable say it is not permissible to exchange one Muslim prisoner for two non-Muslims, as this supports the enemy<sup>99</sup>. However, this argument is unacceptable as it is inconsistent with the actions of the Prophet (pbuh). Also, saving Muslim prisoners is more important than killing non-Muslim prisoners.<sup>100</sup> Furthermore, Al-Shabani explains, “If the enemy agree to exchange one of our prisoners for two or three of their prisoners, the Islamic leader must consider that offer, and if he finds that the interest of the Muslims is served by that offer, he should accept it; if not, he should not accept it”.<sup>101</sup>

#### 4.1.4.2. By money

The Prophet (pbuh) applied this principle in a number of cases. On the Day of *Badr*, the Prophet (pbuh) released most of the prisoners for a ransom; four, three, two or one thousand *Dirhams* for every prisoner, depending on their wealth.<sup>102</sup>

It has been narrated that some of the Prophet's companions asked him to release their relative, who was called Abas, without ransom, but the Prophet refused.<sup>103</sup> The Prophet (pbuh) released the captives of the Battle of Hunayn having received property from the Hawazin tribe as ransom.<sup>104</sup> It has been narrated that the people of Hawazin came to the Prophet (pbuh) asking him to give back their prisoners, then the Prophet addressed his companions, saying 'Your brothers came with regret, and I see that, I will return their prisoners for them'. So the Prophet released the captives and kept their property.<sup>105</sup>

This led the majority of Islamic scholars to agree on the permissibility of releasing prisoners of war in exchange for money<sup>106</sup> (without mentioning the amount of money, which means it depends on the circumstances).

On the other hand, the Hanafai scholars argue that it is not legitimate to ransom prisoners of war for money. Some of them argue if the prisoner is old and he cannot support the enemy, it is legitimate; while, others say that the exchange of prisoners of war for money is not legitimate unless there is a case of necessity for money.<sup>107</sup> However, there is no strong evidence to support their view and the events that occurred during the battles of the Prophet (pbuh) when he exchanged prisoners of war support the majority's view.

Finally, the majority of Islamic scholars agree on the permissibility of releasing prisoners of war with a contract (agreement to pay *Jezyah*), which obligates the prisoner to pay an annual payment and gives him the right to live in the Islamic State under the protection of the Islamic authority. They rationalise that by saying, it is legitimate to release prisoners of war without ransom or for a ransom received from him once, so it is obvious that taking it every year is legitimate.<sup>108</sup>



#### 4.1.4.3. By working.

On the Day of Badr, the Prophet applied this principle. Some prisoners had no money to pay for their release and they could read and write, so he agree with them that each one to teach ten young Muslims how to read and write, and if they learned well, he would release them.<sup>109</sup>

The people of Makkah were literate and the people of Madinah were illiterate. Islam is concerned for education, as indicated by the fact that the first revelation to the Prophet was the Chapter of *Iqra* (read) Allah says, “ Proclaim! (Or read!) In the name of thy Lord and Cherisher, Who created - Created man, out of a leech-like clot: Proclaim! And thy Lord is Most Bountiful, - He Who taught (the use of) the Pen, - Taught man that which he knew not” (H. Q. S96. A1-5). Therefore the Prophet (pbuh) asked those prisoners who could not pay the ransom to teach ten young Muslims how to read and write. In this way the prisoner would be released and get his freedom and the Muslims would learn. The benefit of education is no less important than money for Muslims and indeed, some of these children who learned from the prisoners of war at that time later were among those who wrote down the revelation (*Quran*).<sup>110</sup>

## **4.2, The End of Capture in International Law**

The status of prisoner of war comes into being as soon as a person is in the custody of the enemy, irrespective of whether he was captured by military forces or civilians. Article 5 reads, "The present Convention shall apply to the person referred to in Article 4 *from the time they fall into the power of the enemy* and until their final release and repatriation"<sup>111</sup> (emphasis added).

This legal status, which arises for the prisoner of war under the 1949 Geneva Convention, will remain until the termination of captivity. So how is it terminated?

According to the 1949 Geneva Convention, the status of a prisoner of war could be terminated in a number ways:

1. Escape of prisoner of war with success in leaving the territory of the enemy;<sup>112</sup>
2. Release on parole;<sup>113</sup>
3. Death of prisoners of war;<sup>114</sup>
4. Repatriation during the course of hostilities; <sup>115</sup>
5. Release and repatriation.<sup>116</sup>

In the following sections we will discuss these cases in some detail.

### **4.2.1. Escape**

Undoubtedly, efforts of prisoners of war to escape and retrieve their freedom go back a very long time. Such behaviour is considered legal in the view of the prisoner and his country of origin, but not in the view of the Detaining Power, which considers this act as an offence, and will take all possible precautions to prevent escape<sup>117</sup> The Brussels Declaration stated, in Article 28, paragraph 2: "Arms may be used, after summoning, against a prisoner of war attempting to escape". That phrase was not, however, included either in the Hague Regulations or in the 1929 Convention, not because its validity was disputed, but simply because "it was felt that this was a delicate matter to express in a Convention".<sup>118</sup> The experience of the Second World War, when many prisoners of war were killed, led to a new provision in the 1949 Geneva Convention. Article 42 reads, "The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances".

According to the 1949 Geneva Convention, escape is considered successful in three cases:

1. When the escapee has joined the armed forces of the Power on which he depends, or the armed force of a friend of his Power of Origin;
2. When he has left the territory under the control of the Detaining Power, or of an ally of the Detaining Power;
3. When he has reached a ship flying the flag of his own Power of Origin, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last-named Power.<sup>119</sup>



In these cases, the status of prisoner of war, and the relationship between the prisoner who succeeded in escaping and the Detaining Power will be brought to an end. The Detaining Power is not allowed to punish the prisoner, because of the escape, if he is recaptured. The second paragraph of Article 91 provides that, "Prisoners of war who have made good their escape in the sense of this Article and who are recaptured shall not be liable to any punishment in respect of their previous escape".

However, if the prisoner is recaptured before making good his escape, while he is trying to escape, the 1949 Geneva Convention limits the reaction of the Detaining Power against him, to a disciplinary punishment. Article 92, paragraph (1) reads, "A prisoner of war who attempts to escape and is recaptured before having made good his escape in the sense of Article 91 shall be liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence".

If the Power of Origin (on which the escapee depends) is informed of his escape then it must be notified of the recapture, through the Information Bureaux and Central Agency.<sup>120</sup>

In the case of capture of an escaped prisoner of war before has made a successful escape, he must be returned immediately to military custody.<sup>121</sup>

Under Islamic Law, the situation is no different from what was established in the 1949 Geneva Convention regarding the escape of prisoners of war. In view of the fact that in the period of the Prophet (pbuh) there were no particular places to keep prisoners of war, the Prophet used to lock up prisoners in the Mosque or hand them to his companions and ask them to bind the prisoners to prevent their escape.<sup>122</sup> This indicates that the Islamic State took all possible precautions to prevent prisoners from escape, which were available at that

time. According to some Islamic scholars, it is the right of Muslims to take all measures to prevent a prisoner from escaping, and even to kill a prisoner who is attempting to escape, if that is the only way to stop him from escaping.<sup>123</sup>

If a prisoner of war attempts to escape and he does not make good his escape and is recaptured, he will keep the status of prisoner of war and he should not be punished. The following tradition proves that. It has been narrated that a prisoner of war escaped from the room of Aisha (the wife of the Prophet) where he was detained, while she was busy with some women. The Prophet (pbuh) sent some of his companions to go after him and bring him back and when he was recaptured, the Prophet did not punish him.<sup>124</sup> This case indicates that the status of prisoner of war will remain for one who has attempted to escape and not succeeded, and he is entitled to be treated as a prisoner of war. Another example is the case of Suhayl Bin Amr, who was captured on the Day of Badr, and escaped, then was recaptured and brought before the Prophet (pbuh). The Prophet did not order him to be punished but to be bound by tying his hand to his neck, to prevent him from escape.<sup>125</sup>

However, in Islamic Law, the status of prisoner of war will terminate if the prisoner of war succeeds in escaping by leaving the territory of Islam, reaching the territory of his Power of Origin or a friend of his Power of Origin. According to Amer, if the prisoner succeeds in escaping, then the status of prisoner of war is terminated,<sup>126</sup> even if he escapes during the transfer to *Dar al-Islam* (Islamic territory) and he will return to his normal position, a free man.<sup>127</sup>



#### 4.2.2. Release on parole

The practice of parole goes back for many centuries. It can be defined as “ the agreement of persons who have been taken prisoner by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war”.<sup>128</sup>

According to the 1949 Geneva Convention, the Detaining Power is authorized to release prisoners of war on parole, if the law of Power of Origin allows it.<sup>129</sup> The second paragraph of Article 21 reads, “Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend”.<sup>130</sup> Conversely, if a prisoner refuses to be released on parole, the Detaining Power is not allowed to force him to accept it: “No prisoner of war shall be compelled to accept liberty on parole or promise”.<sup>131</sup> The parties to the conflict are obliged to exchange information regarding their laws and regulations in respect to allowing or forbidding their soldiers to accept parole. The third paragraph of Article 21 reads, “Each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise”.

Prisoners of war, who have given their parole or promise in accordance with the law and regulation so notified, are obliged to fulfil the conditions of parole<sup>132</sup>, and the Power of Origin is prohibited from accepting or requiring any services from paroled prisoners of war, which may conflict with the promise they have given.<sup>133</sup> On the other hand, it seems that parole could be invalid and not binding, if the law of the Power of Origin does not allow its



soldiers to accept parole.<sup>134</sup> The next question to answer, therefore, is what is the position, if the Power of Origin permits parole and an individual breaks his parole and is recaptured? Historically, prisoners of war who violated parole were not entitled to the status of prisoners of war and could face the death penalty.<sup>135</sup>

More recently, The 1907 Hague Regulation specified that parole violators could lose their status as prisoners of war.<sup>136</sup> Oppenheim states that, “The Hague Regulations do not lay down the punishment for such a breach of parole; but according to a customary rule of International Law the punishment may be capital”.<sup>137</sup>

Under the 1949 Geneva Convention, punishment of parole violators is limited. The first paragraph of Article 87 reads, “Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts”. Arguably, some States prohibit their members from accepting parole and do not address the issue. For instance, “the United States does not authorize any Military Service member to sign or enter into any such parole agreement”.<sup>138</sup> Levie stated that “it is difficult to conceive that any State has laws punishing member of its own armed forces for the violation of a parole given as a prisoner of war”.<sup>139</sup> Furthermore, the Egyptian Military Rules prohibit members of the army from giving parole and any member that breaks this rule could be liable to capital punishment.<sup>140</sup>

Under Islamic Law, the practice of parole can be found in the case of Abo Azah AlShar as he was captured on the Day of Bard then the Prophet (pbuh) released him on condition that he gave his word not to take arms against the Muslims again, but he broke his parole and

was recaptured on the Day of Uhud, so he forfeited the status of prisoner of war and was treated as a war criminal and killed for breaking his promise (violating parole).<sup>141</sup> Also, the Islamic State is obligated not to accept or require from its members any service, which could be inconsistent with their promise that had been given to the enemy. The case of Huthayf Ibn Al-Yaman and his father provides evidence of that. It has been narrated that the Prophet (pbuh) prevented Huthayf Ibn Al-Yaman and his father from participating in the fighting with him on the Day of Badr as they had given their promise to the Quraish not to fight with him, and the Prophet (pbuh) commanded them to fulfil their pledge.<sup>142</sup> Zuhaili states that, “If a Muslim prisoner gives his parole to the enemy that he will not escape or kill anyone, then he must fulfil his word of honour, and this is agreed among the majority of Islamic scholars”.<sup>143</sup>

#### **4.2. 3. Death of Prisoners of War**

The death of a prisoner of war is considered one of the cases, which results in the termination of his legal status. This seems to be clear. However, according to the 1949 Geneva Convention, the Detaining Power is obligated to follow some procedures when such an incident takes place. First, any will, written by the deceased prisoner must be transferred to the Protecting Power. The first paragraph of Article 120 reads, “After death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency”.

The Detaining Power must transmit death certificates, in the form annexed to the present Convention or certified lists by a responsible officer of dead prisoners of war, to the prisoners of War Information Bureau. The death certificate or certified lists must contain all essential information which is needed to identify the deceased prisoner, from their personal card that they carry, the cause of death, the date and place of death, the date and place of burial and all details necessary to identify the graves.<sup>144</sup> In all cases the Detaining Power must carry out a medical examination before the burial or cremation of dead prisoners, to confirm the fact of death.<sup>145</sup>

Dead prisoners of war are to be honourably buried, if possible according to the rites of their religion, and their graves must be respected, maintained and marked, and if possible all those who depend on the same Power are to be buried in the same place.<sup>146</sup> Burial must be in individual graves unless it is impossible in the circumstances. Cremation is permitted only for imperative reasons of hygiene, because of the deceased's religion, or in accordance with request of the dead prisoners of war, and the fact of cremation and reasons must be stated in the death certificate.<sup>147</sup>

The Detaining Power must establish a grave registration service, in order that graves may always be found, and transmit all the information regarding the place and burial to the Power of Origin. The care of the grave and the maintenance of records about any subsequent movements of the bodies is the responsibility of the Power controlling the territory.<sup>148</sup>

Any death or serious injury of a prisoner of war caused by a person or by unknown cause, shall be immediately followed by an official enquiry by the Detaining Power, which shall



without delay report that to the Protecting Power and provide it with a copy of report including the statement of the witnesses. If the investigation indicates the guilt of one or more persons, the Detaining Power is to take the necessary measures to prosecute them.<sup>149</sup>

Under Islamic Law, Islamic scholars agree that the death of a prisoner of war terminates his status.<sup>150</sup> Regarding what has been established in the 1949 Geneva Convention on this matter, Islamic Law in general is no different. Islam requires that deceased prisoners of war must be respected<sup>151</sup> all the time and buried as soon as possible; the mutilation of the remains of prisoners is strongly forbidden Islam.<sup>152</sup> The grave must be respected and individual, unless in exceptional circumstance. On the Day of Badr, the Prophet (pbuh) ordered that the deceased enemies be buried, and they were buried as a group.<sup>153</sup> According to Zuhaili, the Prophet (pbuh) ordered them to be buried jointly out of the disrespect for them, but due to the fact that that were many deceased and it was difficult to bury them individually.<sup>154</sup>

In all cases of death of a prisoner of war, Islamic authority requires an enquiry into the cause of the death and if the investigation shows the guilt of someone he must be punished.<sup>155</sup>

Other procedures in the 1949 Geneva Convention, such as the transfer of the wills of the dead prisoner and transmission of death certificates to the Power of Origin, do not conflict with Islamic Law. However, the cremation of dead prisoners of war, which is permitted in international law in three cases, is not permitted in Islam, even if the religion of prisoner allows it or the dead prisoner had requested it, because the use of fire to burn people, dead or alive, is forbidden in Islam, as it has been narrated that the Prophet (pbuh) did not allow

it<sup>156</sup>, except in case of necessity, such as in case of a high risk of spread of disease. Then, cremation is permitted by the rule which states, “necessity permits the illicit”.

## **4.2. 4. Release and Repatriation**

### **4.2.4.1. During Hostility**

Under the 1949 Geneva Convention, the parties to the conflict are required to release and repatriate, during the course of the hostility, prisoners of war who are seriously sick and wounded, as soon as they are fit to travel.<sup>157</sup> The first paragraph of article 109 reads, “Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel”.

The seriously wounded and sick prisoners of war who entitle to direct repatriation are defined in the first paragraph of Article 110, which will be applied in case no a special agreement on the subject had been concluded<sup>158</sup>, the first paragraph of Article 110 reads, “The following shall be repatriated direct:

1. Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
2. Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
3. Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished”.

Since this definition is quite general in nature<sup>159</sup>, additional detailed guidelines are set down in a Model Agreement Concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War annexed to the Convention (Annex 1A).

Those seriously wounded and sick prisoners of war who are eligible to be repatriated are selected either by the medical authorities of the Detaining Power<sup>160</sup>, or by the Mixed Medical Commissions, which shall be established at the beginning of hostility to examine sick and wounded prisoners of war<sup>161</sup>, and consist of three members, two person who belong to a Neutral State<sup>162</sup> appointed by the International Committee of the Red Cross<sup>163</sup>, the third being appointed by the Detaining Power. They function by majority vote<sup>164</sup>, and the Detaining Power is required to carry out the decision of the Mixed Medical Commissions regarding the repatriation of wounded and sick prisoners of war within three months of the notification of such decisions.<sup>165</sup>

According to the 1949 Geneva Convention, there are several procedures by which prisoners of war may be entitled to appear before the Mixed Medical Commission for a physical evaluation to decide whether they fall within one of the repatriable categories listed in the first paragraph of Article 109 as enlarged in Annex I, Part IA. The first paragraph of Article 113 provides that designation for appearance before the Mixed Medical Commission may be made by:

1. The medical authorities of the Detaining Power
2. A doctor who is a national of the Power of Origin of the prisoner of war, or of an ally of that Power, who acts as a doctor in the camp
3. The prisoner's representative



#### 4. The Power on which the prisoner depends or an organization recognized by it

In addition, any other prisoner, who considers himself medically entitled to repatriation and has not been proposed by any of the previous authorities, is authorized to present himself for examination by the Mixed Medical Commission, and a doctor of the same nationality will examine him, only after examination of the priority category prisoners.<sup>166</sup>

It should be noted that this kind of repatriation must be totally voluntary. Consequently, prisoners of war must not be forced to go home. The third paragraph of article 109 reads, “No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities”. And those prisoners who have been released and repatriated may not be again employed in any-military activity or service during the conflict concerned.<sup>167</sup>

Other sick and wounded prisoners of war who are not considered as seriously sick and wounded are recommended, under The 1949 Geneva Convention, to be accommodated in a Neutral Power. Article 109, second paragraph provides that, parties to the conflict are recommended during the hostility to conclude an agreement with the cooperation of the Neutral Power to accommodate less seriously sick and wounded prisoners of war. The second paragraph of Article 110 specifies the categories of prisoners of war who are eligible to be accommodated in a Neutral Power:

“1. Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.

2. Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat".<sup>168</sup>

However, any sick and wounded prisoners of war who are accommodated in a Neutral Power should be repatriated home at any time if their health deteriorates so they become seriously sick or wounded, or if their mental or physical power remains considerably impaired after treatment.<sup>169</sup>

Finally, the 1949 Geneva Convention contains certain provisions for the repatriation or the accommodation (internment) in a Neutral Power, during the course of hostility, of able-bodied prisoners of war who have been long in captivity. The last sentence of the second paragraph of Article 109 provides that the parties to the conflict "may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity".

This type of repatriation, which occurs during the hostility, covers only a small percentage of prisoners of war. The majority of prisoners of war will be kept in the hands of the enemy until the end of the hostilities. The regulation of Geneva Convention relating them will be highlighted in the next section.

#### 4.2.4.2. After Hostility

In the light of the experience of the Second World War, and to avoid in future conflict long delays in the repatriations of prisoners of war<sup>170</sup>, who had been kept in the hands of the Detaining Power for an indeterminate period, years after the *de facto* end of the war<sup>171</sup>, the first paragraph of Article 118 reads, “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”. In addition, the parties to the conflict are required to act independently to repatriate the prisoners of war held by them even if the agreement between the parties for the cessation of hostilities fails to deal with this subject, or even if there is no such agreement.<sup>172</sup>

Under this article, the parties to the conflict are required to release and repatriate prisoners of war at the end of the hostility, even if there is no peace agreement between the parties to the conflict, which was necessary in the previous Convention.<sup>173</sup> Furthermore, this article attempted to take into account the reality of situations where the cessation of fighting is not necessarily followed by any instrument putting an end to the state of war. The phrase “the cessation of active hostilities” is broad enough to include any term, such as unconditional surrender of the defeated, armistice and agreement, which may be given to the actual situation of the cessation of hostility.<sup>174</sup> The third paragraph of Article 118 requires that prisoners of war be informed of the arrangements adopted for repatriation.

Finally, in all cases, the Detaining Power and the Power of Origin are obligated to share the costs of repatriation of prisoners of war. The last paragraph of Article 118 provides, “This apportionment shall be carried out on the following basis:



(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war”.

The Detaining Power is obliged to return to the repatriated prisoners of war before the repatriation any possessions impounded at the time when the prisoner of war was captured, and any foreign currency taken from him which has not been converted into the currency of the Detaining Power, and in case any item is not returned, must send it to the Information Bureau to be forwarded to the Power on which the prisoner depends.<sup>175</sup>

In all cases, the repatriated prisoner of war is allowed to take with him his personal effects and any correspondence that he has received. The weight is limited to what he can carry, with a maximum of twenty-five kilograms. However, if the prisoner of war is unable to carry all his personal effects, then the Detaining Power shall take charge of them and forward them as soon as an agreement has been reached on the subject between the parties.<sup>176</sup>

Finally, the duty of the Detaining Power to release and repatriate prisoners of war at the end of hostilities does not include those prisoners in respect of whom criminal proceedings for an indictable offence are pending, or against whom a conviction in proceedings has already

been obtained, until the completion of the proceedings and the penalty. In this case, the Detaining Power is required to notify the Power of Origin of the names of any prisoners of war who are detained <sup>177</sup>

This is comparable with what has been established in Islamic Law, and discussed above, which showed that the status of prisoner of war would ordinarily be terminated at the end of hostilities by release with or without ransom.<sup>178</sup>

## **Conclusion**

As the foregoing discussion has shown, there is in general a high level of agreement between Islamic Law and international law regarding the circumstances in which prisoner of war status may come to an end. There are, however, some differences of procedure which can be explained at least in part by the different social circumstances prevailing at the time the Islamic Law was laid down.

The effect of the changed social circumstances is, perhaps, most apparent in the provisions in Islamic Law related to enslavement. Even in the time of the Prophet (pbuh), however, the enslavement of captives was permitted only when practised by the enemy, in order that Muslims should not be unfairly disadvantaged. Other Islamic provisions sought gradually to end slavery, and there is widespread agreement among Islamic scholars that it is not permitted in the modern era. Thus, despite the existence of Islamic provisions on slavery, modern scholars and practice at the matter is consistent with international law.

Both systems of law are unequivocal in their prohibition of killing of prisoners of war purely because of their prisoner status, although the trial and execution of a prisoner of war for a crime, which would normally carry that penalty, is permissible. The two systems of law are also consistent with regard to the prevention of escape and treatment of escapees, although the facilities available for the detention of prisoners in the Islamic State were limited compared with those available in modern times. The general principle in both Islamic and international law is that efforts may be made to recapture an escapee, but if recaptured, a prisoner is not to be subjected to excessive punishment. Moreover, if an escapee manages to reach his Power of Origin or a neutral or friendly Power, he will be safe from further pursuit.

Both systems of law accept some form of ransom, although it is not termed as such in international law, and is confined to the exchange of prisoners of war. One of the points of difference between Islamic and international law is that in the former, forms of ransom other than exchange, namely, ransom for money or work, are also accepted.

Release of prisoners of war may come about during or after the hostilities. In general, Islamic Law only discusses release at the end of hostilities. However, some of the Prophet's traditions discussed in this chapter suggest an Islamic equivalent to the concept of parole whereby a prisoner may be released on the condition that he takes no further part in the fighting. Some States (e.g. USA) do not allow members of their forces to give parole, but where such an undertaking is given, it must be respected, in line with the general principle of the obligation to observe undertakings, which exists in both systems.



Release of prisoners also raises the question of their repatriation. Forcible repatriation is excluded by both systems, which make provision for the protection of prisoners of war who have no wish to be repatriated. Islamic scholars have tended to discuss this issue only in relation to prisoners of war who convert to Islam. There are, however, provisions whereby a non-Muslim can obtain a permit to reside in an Islamic State, with the rights and protection of a citizen, subject to payment of a tax.

In the event that a prisoner of war dies while in custody, under both Islamic and international law, his remains are to be buried with due respect, his will should be sent home and any personal property in his possession forwarded to his family. In Islamic Law, a person who has been taken prisoner by capture, as opposed to one who has surrendered, may have his possessions confiscated, but this does not change the position that any possessions he has been allowed to keep should be returned to his family.

The main difference between the Islamic and international systems in relation to the death of prisoners of war, concerns cremation, which apart from the most exceptional circumstances, is not permitted in Islam. Thus, even if an Islamic state signed the Geneva Convention, it would refuse the request of a prisoner to have his remains cremated, although in these circumstances, cremation is permissible under the Convention. However, since the Convention only provides that the cremation may be performed in certain circumstances, not that it must be so, the Islamic stance is not incompatible with the Convention. Indeed, it may be concluded, that there are no incompatibilities between the two systems, so serious and fundamental as to prevent an Islamic State from being a party to the Convention, and from honouring its obligations thereunder.

## **Endnotes to Chapter Four**

- <sup>1</sup> Al-Shafai, Alum, op cit, vol 4, p176. See also, al-Bahuti, op cit, vol 3, p40. See also, Hayhal, op cit, vol 3, p1544.
- <sup>2</sup> Al-Kasani, op cit, vol, 7, p119.
- <sup>3</sup> Al-Dasuqi, Muhammad Ibn Ahmad, Hasheah Ala al-Sharh al-Kabeer, Cairo, Matbat Mustfa al-Halabi, no date, vol 4, p 169. See also, An-Naim, Abdullahi Ahmed, Toward an Islamic Reformation, Civil Liberties, Human Right, and International Law, New York, Syracuse University Press, 1990, p173.
- <sup>4</sup> Al-Bukhari, op cit, Jihad section, vol 4, Book 53, H. No. 367. See also, Muslim, op cit, Jihad section, vol 3, H. No. 1385. See also, Al-Shwkani, op cit, vol 8, p143.
- <sup>5</sup> Al-Tarmathi, op cit, Jihad section, vol 4, p213.
- <sup>6</sup> Ibn al-Qayyim, Zad al-Maed, op cit, p405. see also, al-Kasani, op cit, vol 7, p 121.
- <sup>7</sup> Al-Jassas, op cit, vol 3, p319.
- <sup>8</sup> Amer, op cit, p172.
- <sup>9</sup> Khadduri, War and Peace, op cit, p127.
- <sup>10</sup> See next section.
- <sup>11</sup> Al-Sarakhasi, al-Siyar, op cit, vol 3, p1027.
- <sup>12</sup> Al-Qurtubi, op cit, p2912.
- <sup>13</sup> Al-Jassas , op cit, vol 3, p391.
- <sup>14</sup> Al-Zuhaili, Athar al-Harb, op cit, p439.
- <sup>15</sup> Amer, op cit, p177.
- <sup>16</sup> Abo Zahra, Alaqat, op cit, p122.
- <sup>17</sup> Malik, al-Mudawanh, op cit, vol 2, p 9. See also, Al-Shafai, Alum, op cit, vol 4, p69. See also, Ibn Qudamah, al-Muqnu, op cit, vol 10, p400.
- <sup>18</sup> Al-Zuhaili, Athar al-Harb, op cit. p 430.
- <sup>19</sup> Ibn Hisham, op cit, vol 1, p342.
- <sup>20</sup> Qutb, Sayyid, al-Zalil, op cit, vol 29. p30.
- <sup>21</sup> Haykal, Muhammad Husayn, The Life of Muhammad, Translated by Ismail Ragi A., Delhi, al Faruqi, Crescent Publish Co, 1990, p 223.
- <sup>22</sup> Al-Mawardi, op cit, p 127.
- <sup>23</sup> Ibn Saad, Muhammad, al-Tabaqat al-Kubra, Beirut, Dar al-Fakar, 1376 A.H/1957 AD, vol 2, p43.
- <sup>24</sup> Ibn Hisham, op cit, vol2, p 240. See Also, Al- Tabari, al-Tafseer, op cit, vol 2, p 591.

- <sup>25</sup> Al- Asqalani, op cit, vol 6, p165.
- <sup>26</sup> Al-Mawardi, op cit, 117.
- <sup>27</sup> Ibn Hisham, op cit, vol 2, p273.
- <sup>28</sup> Al-Mawardi, op cit, 118.
- <sup>29</sup> Al-Zuhaili, Athar al-Harb, op cit. p477.
- <sup>30</sup> Ibn Rushd, al-Bidayat, op cit, vol I, p369.
- <sup>31</sup> Haykal, op cit, p1545.
- <sup>32</sup> Al Ghunaimi , Mohammed Talat, Nazarah Amah fil-Qanon al-Dawali al-Insani al-Islami, an Article published during the first Egyptian conference concerning international humanitarian law, Cairo, 20-24 Nov, 1982, Egyptian Society of International Law Press, p 46.
- <sup>33</sup> Ibn Hayan, Muhammed Ibn Yousof, Tafseer al-Baher al-Muheed, Cairo, Dar al-Fikr, Secund edition, 1403 A.H/ 1983 A.D, vol 8, p82.
- <sup>34</sup> El-Far, A., op cit, p178.
- <sup>35</sup> Al-Bukhari, op cit, al-Maqazi sestion, H. No. 3720.
- <sup>36</sup> Al-Bukhari, op cit, al-Maqazee section, vol 8, p78, Muslim, op cit, Jihad section, vol3, p1386.
- <sup>37</sup> Muslim, op cit, Jihad section, H. No. 3373.
- <sup>38</sup> Abu Dawood, op cit, Book 14, H. No, 2686. See also, Ibn Hanbal, al-Musnd, op cit, H. No. 25158.
- <sup>39</sup> Ibn Hisham, op cit, vol 4, p55.
- <sup>40</sup> See supra section 4.1.1.2.
- <sup>41</sup> Ibn Qudamah, al-Muqni, op cit, vil 8, p372. See also, Ibn Hazm, op cit, vol 7, p309. See also, Ibn Rushd, al-Bidayat, op cit, vol I, p204.
- <sup>42</sup> Al-Kasani, op cit, vol 7, p118. See also, Ibn al-Humam, op cit, vol4, p406.
- <sup>43</sup> Al-Asqalani, op cit, vol 6, p152.
- <sup>44</sup> Alsumaih, The Sunni Concept, op cit, p153.
- <sup>45</sup> Al-Waqidi, Muhammad bin Omar, Kitab al-Maghazi, Beirut, Ilam al-Kutub, third edition, 1404 A.H, 1984 A.D, vol 3, p11.
- <sup>46</sup> Levie, Howard S, op cit, p3.
- <sup>47</sup> Pritchard, A.M, Leage's Roman Private Law, New York, St. Martin's Press, 1961, P 78. See also, Cuffel, Victoria, the Classical Greek Concept of Slavery, Journal of the History of Ideas, vol. 27, No. 3. (Jul. - Sep., 1966), pp 323-331. See also, Lewis, Bernard, Race and Slavery in the Middle East, Oxford University Press 1994, 02/may/2001, <http://www.fordham.edu/halsall/med/lewis1.html>.
- <sup>48</sup> The Hebrew Code – Exod XXI says, “ 1. Now these are the laws which you shall set before them. 2. When you buy a Hebrew slave, six years he shall serve and the seventh year he shall go out free for nothing. 3... if



he is married his wife shall go out with him". Diamond, A.S, Primitive law, London, 1935, p 103.

<sup>49</sup> Cuffel, op cit, p342.

<sup>50</sup> Ibid, p332.

<sup>51</sup> Madden, John. Slavery in the Roman Empire Numbers and Origins, Ireland, University College Dublin, Classics Ireland, 1996, vol 3, 10/5/2001, [www.ucd.ie/~classics/96/Madden96.html](http://www.ucd.ie/~classics/96/Madden96.html).

<sup>52</sup> Salkowski, Carl, The Institutes: History and System of Roman Private Law with catena of texts, translated in full and ed. by E.E. Whitfield, London, Stevens, 1884, p166.

<sup>53</sup> Westermann, William Linn, Industrial Slavery in Roman Italy, Journal of Economic History, Vol. 2, No. 2. (Nov., 1942), p149-151.

<sup>54</sup> Colossians 3:22 "Servants, obey in all things your masters according to the flesh; not with eyeservice (sic), as menpleasers (sic); but in singleness of heart, fearing God". (The Holy Bible, King James Version, New York, American Bible Society, 1999, Bartleby.com, 2000. [www.bartleby.com/108/](http://www.bartleby.com/108/). [1/7/2002].

<sup>55</sup> Siddiqi, Amir Hasan, Studies in Islamic History, Karachi, the Jamiyatul Falah Publications, 1967, p146.

<sup>56</sup> Khadduri, War and Peace, op cit, p130.

<sup>57</sup> Lewis, Bernard, Race and Slavery, op cit.

<sup>58</sup> Al Zuhaili, Athat Al-Harb, op cit, p442.

<sup>59</sup> Lewis, Bernard, Race and Slavery, op cit.

<sup>60</sup> An-Naim, op cit, p173.

<sup>61</sup> Mawdudi, Allamah Abu al-Ala, Human Rights in Islam, Al-Tawhid Journal, vol IV, No 3, 7-9/1407 A.H. <http://www.islamworld.net/hr.txt> 6/4/2001. See also, Khadduri, War and Peace, op cit, pp130-131.

<sup>62</sup> Mawdudi, Allamah Abu al-Ala, op cit.

<sup>63</sup> Al-Bukhari, op cit, Emancipation Section, vol 5, p146, H. No. 2517.

<sup>64</sup> Al-Bukhari, op cit, Believe Section, vol 1, p84, H. No 30.

<sup>65</sup> Al-Bukhari, op cit, Emancipation Section, vol 5, p177, No. 2552.

<sup>66</sup> Muslem, op cit, H. No. 3135. See also, Abu Dawood, op cit, H. No.4492. See also, Ibn Hanbal, al-Musnd, op cit, H. No.16467.

<sup>67</sup> Al-Jassas, op cit, vol 3, p480. See also, Al-Qurtubi, op cit, vol 8, p 48. See also, Al- Shwkani, op cit, vol 7, p305. See also, Al-Zuhaili, Athat Al-Harb, op cit, p 445.

<sup>68</sup> Al- Shwkani, op cit, vol 8, p 2.

<sup>69</sup> Al-Tabari, al-Tafseer, op cit, vol 026, p 24.

<sup>70</sup> Al-Zuhaili, Athat Al-Harb, op cit, p 446.

<sup>71</sup> Abu-Zahra, Alaqat, op cit, pp 115,116.

<sup>72</sup> Qutb, Sayyid, *al-Zalil*, op cit, vol 26, p53.

<sup>73</sup> Khadduri, *War and Peace*, op cit, p131-132.

<sup>74</sup> Shlabi, Ahmad, *al-Jihad wal-Nadum al-Askarreh fal-Faker al-Islammi*, Cairo, Maktabat al-Nahdah al-Arabi, Second edition, 1974 A.D, P125.

<sup>75</sup> Al-Zuhaili, *Athar Al-Harb*, op cit, p 445.

<sup>76</sup> Alsumaih, *prisoners of war*, op cit, p73.

<sup>77</sup> El-Ghirani, Muhammad, *The Legal Concept of Human Rights in Islam*, Glasgow, Dissertation, The University of Glasgow, Thesis submitted for the degree of L.L.M, Not published, 1986, p 76.

<sup>78</sup> Amer, op cit, p218.

<sup>79</sup> Siddiqi, op cit, p148.

<sup>80</sup> Amer, op cit, p219.

<sup>81</sup> Lewis, Bernard, *Race and Slavery*, op cit.

<sup>82</sup> Ibn Qudamah, *Al-Muqni*, op cit, vol 9, p 386.

<sup>83</sup> Siddiqi, op cit, p148.

<sup>84</sup> Wafe, Abdulwaheed, from a lecture, which was presented in the sixth meeting for recognizing the principles of Islam, p 129, cited from Amer, op cit, p221.

<sup>85</sup> Amer, op cit, p221.

<sup>86</sup> Ibn Mandour, *Lesan al-Arib*, op cit, Fida material.

<sup>87</sup> Al-Zuhaili, *Athar al-Harb*, op cit, p451.

<sup>88</sup> Al-Tabari, *al-Tafsee*, op cit, vol 26, p40.

<sup>89</sup> Muslim, op cit, *Jihad section*, vol 3, p 1375.

<sup>90</sup> Ibn Hisham, op cit, vol 2, p4.

<sup>91</sup> Al-Kasani, op cit, vol 7, p118.

<sup>92</sup> See supra 4.1.

<sup>93</sup> Al-Naisaboury, op cit, p160.

<sup>94</sup> Al-Qurtubi, op cit, vol 8, p 46.

<sup>95</sup> Qutb, Sayyid, *al-Zalil*, op cit, vol 26, p49.

<sup>96</sup> The full story is, "Thaqif (an Arabic tribe at war with the Muslims) were allies of Banu Aqeel (another Arabic tribe). Thaqif captured two companions of the Prophet (peace be upon him). Thereafter, other companions captured a man from Banu Aqeel, and brought him to the encampment of the Prophet, peace be upon him. The prisoner said: "Oh Muhammad!" upon which the Prophet approached him and replied, "What do you seek?" The prisoner replied, "Why have you taken me (prisoner) and why have you taken my camel (which was taken by the Prophet, peace be upon him, and named 'Al Addbaa')? The Prophet replied to the

prisoner: "I took you because of the crimes committed by your allies Thaqif." He (the prisoner from Banu Aqeel) then called upon the Prophet, "Oh Muhammad!" upon which the Prophet, peace be upon him, approached and replied, "What do you seek?" The prisoner replied, "I am a Muslim," upon which the Prophet said: "If you had said this (declaration of his Islam) when you were in full control of your situation, then you would have attained success, all the success." The prisoner then called upon the Prophet, "Oh Muhammad!" The Prophet, peace be upon him returned and said: "What do you seek?" The prisoner replied, "I am hungry; feed me, and I am thirsty; give me drink." The Prophet replied, "This is your (rightful) need." Later, the prisoner was exchanged for two Muslim prisoners."

Al -Shwkani, op cit, vol 8, P146. See also, Amer, op cit, p193.

<sup>97</sup> Muslim, op cit, Jihad section, vol 12, p 68.

<sup>98</sup> Al-Shafai, Alum, op cit, vol4, p69. see also,

<sup>99</sup> Al-Kasani, op cit, vol 7, p121.

<sup>100</sup> Amer, op cit, p193.

<sup>101</sup> Al-Sarakhasi, al-Siyar, op cit, vol 4, p 1660.

<sup>102</sup> Ibn Kather, al-Bidaya wa al-Nihaya, Beirut and Riyadh, Maktabat al-Maarif and Maktabat al-Nasr, 1966 A.D, vol3, p 307.

<sup>103</sup> Bukhairi, op cit, al-Maqazi section, H. No, 3714.

<sup>104</sup> Ibn Hisham, op cit, vol 2, p4.

<sup>105</sup> Al-Bukhari, op cit, H. No. 2395.

<sup>106</sup> Ibn Rushd, al-Bidayat, op cit, vol I, p204. See also, Ibn Qudamh, Al-Mughni, op cit, vol8, p372. See also, Ibn Hazm, op cit, vol 7, p309. See also, Al-Mawardi, p61.

<sup>107</sup> Al-Sarakhasi, al-Siyar, op cit, vol 3, p 1025.

<sup>108</sup> Ibn al-Humam, op cit, vol 4, p 306. See also, Al-Shafai, Alum, op cit, vol 4, p68. See also, Ibn Qudamh, Al-Mughni, op cit, vol8, p375.

<sup>109</sup> Ibn Hisham, op cit, vol 2, p 304

<sup>110</sup> Alsumaih, The Sunni Concept, op cit, p148.

<sup>111</sup> The 1949 Geneva Convention.

<sup>112</sup> Article 91.

<sup>113</sup> Article 21.

<sup>114</sup> Article120, 121.

<sup>115</sup> Article 109, 110.

<sup>116</sup> Article 118.

<sup>117</sup> Levie, Howard S., op cit, p403.

<sup>118</sup> <http://www.icrc.org/IHL.nsf/1a13044f3bbb5b8ec12563fb0066f226/e3837df8c8c553c7c12563cd0042695a?OpenDocument>, 20/5/2001.



<sup>119</sup> The first paragraph of article 91.

<sup>120</sup> Article 94.

<sup>121</sup> The second paragraph of Article 92.

<sup>122</sup> The case of Thumama, he was bound to one of the pillars of the mosque.

<sup>123</sup> Ibn Qudamah, al-Muqnu, op cit, vol 7, p407. See also, Amer, op cit, 163.

<sup>124</sup> Al-Bukhari, op cit, vol 9, p89.

<sup>125</sup> Al-Waqidi, op cit, vol 3, p100.

<sup>126</sup> Amer, op cit, p163.

<sup>127</sup> Al-Kasani, op cit, vol 7, p 117.

<sup>128</sup> Bouvier's, Law Dictionary 2459, 1941, cited from Brown, Major Gary D, Prisoner of War Parole: Ancient Concept, Modern Utility, Military Law Review, vol 156, p 200,

<sup>129</sup> Levie, Howard, S., op cit, p400.

<sup>130</sup> Article 21.

<sup>131</sup> Ibid.

<sup>132</sup> Levie, Howard, S., op cit, p400.

<sup>133</sup> Article 21.

<sup>134</sup> Levie, Howard, S, op cit, p401.

<sup>135</sup> Brown, Major Gary D, Prisoner of War Parole: Ancient Concept, Modern Utility, Military Law Review, Vol 156, p 212,

<sup>136</sup> Article 12 of The 1907 Hague Regulation, it reads, "Prisoners of war liberated on parole and recaptured bearing arms against the Government to which they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and may be put on trial before the Courts".

<sup>137</sup> Lauterpacht - Oppenheim, vol II, p 302.

<sup>138</sup> U.S Dep't of Defense, Dir. 1300.7, Training and Education Measures Necessary to Support the Code of Conduct, encl.2, Para. B3a (5) (32Dec. 1988), cited from Brown, Major Gary D, Prisoner of War Parole: Ancient Concept, Modern Utility, Military Law Review, vol 156, p 215.

<sup>139</sup> Levie, Howard, S., op cit, p402.

<sup>140</sup> The second paragraph of Article 134 in that Law, from Al-Far, A., p358.

<sup>141</sup> Al-Bukhari, op cit, vol 9, p65.

<sup>142</sup> Muslim, op cit, vol 12, p144.

<sup>143</sup> Zuhaili, Ather al-Harb, op cit, p470.

<sup>144</sup> Article 120, second paragraph.

<sup>145</sup> Article 120, third paragraph.

<sup>146</sup> Article 120, fourth paragraph.

<sup>147</sup> Article 120, fifth paragraph.

<sup>148</sup> Article 120, sixth paragraph.

<sup>149</sup> Article 121.

<sup>150</sup> Al Shathlei, op cit, p 120.

<sup>151</sup> It has been narrated that the Prophet (pbuh) used to stand up when he saw a funeral regardless of the religion of the deceased. Once when the Prophet stood, his companions said, "It is a funeral of a Jew". He replied, "Is he not a spirit?".

<sup>152</sup> Hamidullah, op cit, p254.

<sup>153</sup> Al Asqalani, op cit, vol 6, p 317. See also, Al-Bayhaqi, Ahmad ibn al-Husayn, al-Sunan al-Kubra, Dar al-Maarif, Cairo, 1354 A.H, vol 9, p 148.

<sup>154</sup> Zuhili, Ather Al Harb, p 489.

<sup>155</sup> Prisoners of war are in the hands of the State and under its protection and any person who attacks a prisoner or kills him, is breaking the law of the State and deserves punishment, See, Ibn Qudamah, , al-Muqnu, op cit, vol 7, p407. See also, Al-khteeb, op cit, vol 4, p 228.

<sup>156</sup> Al-Bukhari, op cit, vol 6, p149.

<sup>157</sup> For more details of the development of the repatriation of wounded and sick prisoners of war see, Levie, Howard S. op cit, 408.

<sup>158</sup> Article 110, fourth paragraph.

<sup>159</sup> Rosas, Allan, op cit, p471.

<sup>160</sup> Article 112, second paragraph.

<sup>161</sup> Article 112, first paragraph.

<sup>162</sup> ANNEX II, Article 1.

<sup>163</sup> ANNEX II, Article 2.

<sup>164</sup> ANNEX II, Article 10.

<sup>165</sup> ANNEX II, Article 12.

<sup>166</sup> Article 113, second paragraph

<sup>167</sup> Article 117.

<sup>168</sup> Numerous cases falling into this category are listed in a Model Agreement Concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War annexed to the Convention (Annex 1B).

<sup>169</sup> Article 110, third paragraph

<sup>170</sup> After World War II, and after the unconditional surrender of Germany, many German prisoners of war remained in the hands of the adversary for over two years, See Howard, S. Levie, op cit, footnote 116, p 418.

<sup>171</sup> Shields Delessert, Christiane, Release and Repatriation of Prisoners of War at the End of Active Hostilities, Verlag Zurich, Schulthess Polygraphischer 1979, p70

<sup>172</sup> The second paragraph of article 118.

<sup>173</sup> Article (20) of the 1907 Hague Regulations, which reads, "After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible". The first paragraph of Article (75) of the 1929 Geneva Convention reads, "When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war. If it has not been possible to insert in that convention such stipulations, the belligerents shall, nevertheless, enter into communication with each other on the question as soon as possible. In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace".

<sup>174</sup> Shields Delessert, op cit, p71.

<sup>175</sup> Article 119, second paragraph. See also, Article 122.

<sup>176</sup> The third and the fourth paragraphs of Article 119.

<sup>177</sup> The fifth and sixth paragraphs of Article 119.

<sup>178</sup> See supra 4.1.2 and 4.1.4.



## **Conclusion**

The phenomenon of war is one which has existed and continues to exist ever since the earliest civilisations of humankind. From our study it has appeared that both Islamic law and international law attempted to regulate the act of resorting to war. This study was concerned with one of the aspects of such regulation, namely, the treatment of prisoners of war. From our discussion it appears that both Islamic law and international law divided war into just war and unjust war. Many similarities exist between the two systems, such as the prohibition of falsity and breach of faith, vandalism, the mutilation of the dead or the killing of civilians.

It has been shown that the normal relationship between Muslim and non-Muslim States should be based on peace and mutual respect, a characteristic which falls in line with current international obligations such as that under Art. 2(4) of the UN Charter. Peace is the norm in Islamic law according to our findings. Nevertheless, war was permitted, albeit, only in limited circumstances. These include self-defence, the protection of Muslim minorities against crimes committed against humanity, such as genocide, and acts taken under the protection of the mission of Islam. Actions taken under war according to Islamic law are to cease once the specific circumstances giving rise to them have ended.

From our examination of the opinions of Islamic scholars regarding the concept of prisoners of war, it appeared that not all those who are captured by Muslims are considered as prisoners of war. Islamic law sets a number of conditions that must be met before an individual is considered as a prisoner of war. These conditions include the existence of a state of war between the Islamic State and the State of the captured

individual; and that the captured person must be one of the persons involved in fighting. Some Islamic scholars have provided a number of descriptions of those who may be captured and treated as prisoners of war and those who should not be captured. Those descriptions have amounted to the level of regulations and were introduced more than 1400 years ago, long before such provisions were incorporated into current international law. Such regulations may or may not be consistent with many of the provisions of modern international law due, to the difference in circumstances and customs which existed at that time. However, in general, the leader of the Islamic State has the authority to enter into agreements with other States which may specify the persons who are to enjoy prisoner of war status, such as media correspondents covering war or medical personal. Once such an agreement is signed by the Islamic State, then it must abide by its obligations under the agreement. Islamic law in this respect shows a great degree of flexibility in that, if an agreement does not violate a fundamental rule of Islam, then there is nothing in Islam that prevents the Islamic State from being a party to that agreement, and once it is a party to that agreement, it must fulfil its obligations thereunder.

From our discussion, it appeared that there are certain categories of people who do not fall within the definition of prisoner of war according to Islamic law, namely, mercenaries; spies; and citizens who have aligned themselves with the enemy. The provisions of Islamic law on those categories of people are consistent with those of international law on the issue.

It also appeared that the prisoner of war is considered as a prisoner of the Islamic State and not a prisoner of the individual who has captured him. Therefore, it is not permissible for the direct captor to kill the captured person(s) or decide their fate on an



individual basis. Such a decision lies within the scope of the leader's authority, who bases his decision in accordance with the provisions of the Holy Quran and Sunna - the two primary sources of Islamic law - or any agreement governing this matter which does not violate the provisions of Islamic law.

The thesis also focused on the treatment of prisoners of war during captivity in general. From our discussion, it appeared that both Islamic law and international law consider a person to be categorised as a prisoner of war once he has been captured by the forces of the other party. Once in captivity, the captor, according to both systems of law must refrain from any acts of coercion against the prisoner of war in order to obtain any military information. Both systems oblige the captor to preserve the rights of the prisoners of war under their control and to hand them over to the competent authority charged with dealing with prisoners. There are instances in Islamic practise, however, where prisoners of war were tied to ropes in order to prevent them from escaping. This is indeed is inconsistent with the provisions of the 1949 Geneva Convention. However, such a practice was only permitted on the ground that there were no proper detention facilities or compounds at the time of the first Islamic State. Therefore, this was the only way to ensure that the prisoners would not escape. Also, with regard to the treatment of prisoners of war, both systems recognise the legitimacy of using prisoners of war as labourers.

With regard to the personal possessions of the prisoner of war in Islamic law, since the prisoner, as already mentioned above, is considered as prisoner of the State, then the captor, therefore, has no right to take any of the captured person's belongings. On the contrary, he must preserve them and hand them over to the competent authority. However, there is a certain school of thought which contradicts with the above



statement and believes that all personal possessions of the prisoner must be confiscated in accordance with certain cases in which such practise was permitted. However, this view may be refuted on the ground that such a practice was common at the time it was exercised, but has no direct basis in Islamic law. It may therefore be said that it is dependant upon the circumstances and customs of war at the time. Currently regulated by international treaties and conventions that proscribe the confiscation of the personal belongings of prisoners of war, especially money, and instead oblige the Detaining Power to preserve them and allow the prisoner to make use of them as far as necessary. During the period of captivity, the prisoner of war is entitled to a number of rights which are upheld by both Islamic law and international law, namely, the right to food and clothing; the right to communicate with the outside world; the right to medical attention; and the right to practise one's own religion.

With regard to the fate of prisoners of war detained by a certain party to a conflict, this issue has been dealt with in the 1949 Geneva Convention under Arts. 18-19. According to Islamic law, their fate is to be determined by the leader who has several options according to different Islamic scholars. The options include executing them, enslaving them, releasing them for ransom or releasing them unconditionally. Regarding the issue of execution of prisoners of war in Islamic law, it appeared from our discussion that such practice is proscribed, and although there were cases in which prisoners of war were executed during the era of Prophet Mohammed (pbuh), it appeared that those executions were carried out because those executed had committed individual crimes which, according to Islamic law, are punishable by death and not because of their participation in fighting against the Islamic army, nor because of their status as prisoners of war.

Regarding the enslavement of prisoners of war, although, as already mentioned above, this is an option that is available to the leader, nevertheless, our discussion showed that such practise was resorted to by Muslims only because the other party committed it with Muslim prisoners. Although slavery was common at that time, nevertheless, Islam attempted gradually to eliminate the institution of slavery by prohibiting certain sources of slavery, which were practiced in ancient times. It also created numerous ways in which slaves could obtain their liberty. In the current state of affairs, it appears acceptable for an Islamic State to enter into an agreement or convention which prohibits slavery. Such an agreement would indeed appear to be recommended under Islamic law. In such a situation, the Islamic State must abide by any obligations that may arise under the agreement. Therefore, since the killing or enslavement of prisoners of war is proscribed under Islamic law, then the only options left to the leader of the Islamic State are the release of the prisoners for ransom or release them for nothing in return, as stated in the Holy Quran:

“Therefore, when ye meet the Unbelievers (in fight), smite at their necks; at length, when ye have thoroughly subdued them, bind (the captives) firmly: *thereafter (is the time for) either generosity or ransom*” (H. Q. S47. A4) [emphasis added].

From our discussion in this thesis, it appeared that there are no major differences between Islamic law and international law regarding the treatment of prisoners of war despite the considerable gap in time between the two systems. Therefore, it can be said that the 1949 Geneva Convention is to a great extent consistent with Islamic law on the issue and, therefore, there appears to be no major objection towards the signing of the 1949 Geneva Convention by Islamic States. From our discussion it appeared that Islamic law respected the rights and humanity of prisoners of war. The principles of



Islamic law in this regard were sincerely applied by Muslim fighters, due to their belief that the teachings of the Holy Quran and Sunna were based on the commands of God. Also, certain other factors may have been involved, such as customs and traditions at that time, which emphasised that guests or foreigners in general were to be treated with the utmost level of respect and generosity. Another factor is one which is of a purely religious nature and which arises from the requirement in Islam for the promotion of Islam, either expressly through dialogue or implicitly through one's own personal behaviour. The proper treatment of prisoners of war in this respect by Muslim soldiers may influence non-Muslim prisoners to convert to Islam.

The findings of this study clear the ambiguity that may have surrounded the legal status of prisoners of war in Islamic law in the eyes of some. At present there is widespread ignorance of Islamic Law among non-Muslims, which may be a source of fear and suspicion. However, it has been shown that in relation to the treatment of prisoners of war, there is no cause of such fear, since there is compatibility between Islamic Law and international law. In a world where various legal cultures exist, one cannot but recommend that more should be done in order to promote better understanding of one another. This, with regard to the relationship between Islamic law and international law, requires that more research should be done in order to discover other areas where there may exist a certain degree of consistency between the two systems, thereby reducing fear and leading to better understanding.



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