

The protection of detainees in non-international armed conflict under international humanitarian law and Islamic law

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Abstract

Too often, conflict-related detainees are ill-treated or killed, go missing, or are held in inhumane conditions of detention. Detention occurs in all armed conflicts, including those that involve Muslim-majority States and Islamic non-State armed groups. In

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2024, a substantial percentage of the International Committee of the Red Cross's visits to detention/internment places were in Muslim-majority contexts.

While the humane treatment of detainees is the responsibility of the detaining authorities, third actors, including humanitarian organizations, can and should work with those authorities with a view to making sure that they respect their obligations. To facilitate such dialogue, this article analyzes the protection of detainees under international humanitarian law (IHL) and Islamic law. As the vast majority of today's armed conflicts are non-international in nature, the article focuses on IHL rules applicable in non-international armed conflicts (NIACs), discussing key rules of IHL and Islamic law on the protection of detainees. The selection of rules presented in this article reflects IHL rules applicable in NIACs, based on Article 3 common to the four Geneva Conventions, Additional Protocol II to the Geneva Conventions, and customary IHL rules. The article provides an issue-by-issue analysis that allows the reader to easily understand how IHL and Islamic law address specific issues on the protection of detainees in NIACs.

Keywords: IHL, Islamic law of armed conflict, Islamic law, non-international armed conflict, armed groups, non-State armed groups, protection of detainees, prisoners of war, PoWs under Islamic law, human shields.

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Introduction

“Observe good treatment towards the prisoners.”¹ In this Hadith (the reported sayings, deeds and tacit approvals of the Prophet Muhammad), Muslim soldiers were ordered by the Prophet Muhammad to treat detainees humanely following the capture of seventy enemy soldiers during the Battle of Badr in 624 AD. Fourteen centuries later, this order has not lost any relevance – and importantly, it is aligned with the international legal obligation of all detaining authorities to treat detainees humanely.

Detention occurs in all armed conflicts, including those that involve Muslim-majority States and Islamic non-State armed groups (NSAGs). Muslim contexts experience a significant number of armed conflicts, creating devastation and suffering. For instance, at present about two thirds of the operations of the International Committee of the Red Cross (ICRC), which works to prevent and alleviate the suffering of people affected by armed conflict, are in Muslim contexts.² In 2024, a substantial percentage of the ICRC's visits to detention/internment places

1 Muḥammad ibn Jarīr al-Ṭabarī, *Tārīkh al-Ṭabarī: Tārīkh al-Umam wa al-Mulūk*, Vol. 2, Dār al-Kutub al-Ilmiyyah, Beirut, 2001, p. 39.

2 In this paper, the term “Muslim-majority States” is used to refer to States in which a majority of the population are Muslim. In contrast, “Muslim contexts” is used to refer to regions or communities in which one of the affected communities or belligerents consists of Muslims, whether as a minority or a majority.

were in Muslim-majority contexts.³ While there are many cases in which the international law obligation of humane treatment, or the Islamic law obligation to “observe good treatment” of detainees, is respected, in other cases conflict-related detainees are ill-treated or killed, go missing, or are held in inhumane conditions of detention.

While the “good treatment” of detainees is the responsibility of the detaining authorities, third actors, including humanitarian organizations, can and should work with those authorities with a view to making sure that they respect their obligations. Today, international legal obligations of parties to armed conflicts on the treatment of detainees are found in the four Geneva Conventions, their two Additional Protocols, customary international humanitarian law (IHL), and – as applicable – human rights law and standards. Operational experience and recent research have shown, however, that “an exclusive focus on the law is not as effective in influencing behaviour as a combination of the law and the values underpinning it”.⁴ This suggests that while there are many ways to enhance respect for IHL in order to protect detainees, with Muslim parties to armed conflicts it can be effective to focus operational and legal dialogue not only on IHL but also on Islamic law and the values underpinning both legal systems.

To facilitate such dialogue, this article analyzes the protection of detainees under IHL and Islamic law. As the vast majority of today’s armed conflicts are non-international in nature, the article focuses on IHL rules applicable in non-international armed conflicts (NIACs). It starts with a brief explanation of why building bridges between IHL and Islamic law can strengthen the protection of detainees during armed conflict, before going on to examine a series of preliminary questions on IHL and Islamic law which are essential to understanding the discussion of specific detention rules. The main part of the article presents key rules of IHL and Islamic law on the protection of detainees; the selection of rules presented reflects IHL rules applicable in NIACs, based on Article 3 common to the four Geneva Conventions, Additional Protocol II (AP II), and customary IHL rules.⁵ The article focuses firstly on the rules that protect detainees against ill-treatment (such as the prohibitions against murder, torture, hostage-taking and other forms of ill-treatment), and secondly on the rules on conditions of detention (such as the obligation to provide detainees with food, water, medical assistance, family contact etc.). The article provides an issue-by-issue analysis that allows the reader to

3 See ICRC, *Annual Report 2024: Overview*, Geneva, June 2025, pp. 91, 99, 107, available at: <https://library.icrc.org/library/docs/DOC/icrc-annual-report-2024-overview.pdf> (all internet references were accessed in March 2026).

4 ICRC, *The Roots of Restraint in War*, Geneva, 19 June 2018, p. 65; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, Geneva, 22 November 2019, p. 74.

5 While human rights law and various legally non-binding standards are also relevant to the protection of detainees, they are not reflected in this article. Among other reasons, this choice was made because it continues to be a matter of controversy whether human rights law also binds NSAGs. For some discussion on this subject, see Tilman Rodenhäuser, “The Legal Protection of Persons Living under the Control of Non-State Armed Groups”, *International Review of the Red Cross*, Vol. 102, No. 915, 2020.

easily understand how IHL and Islamic law address specific issues on the protection of detainees in NIACs. Questions on fair trial standards and other procedural safeguards are not addressed in detail.

It is important to keep in mind that there are several schools of Islamic Law, and they interpret the law differently. The views presented in this article mostly reflect interpretations from the legal literature of the four Sunni schools of Islamic law. Interpretations presented in this article may not reflect the views of all Islamic law scholars, Islamic armed groups or Islamic authorities – just as interpretations of IHL presented in this article may not be shared by all international law scholars, States or non-State parties to armed conflicts.

Building bridges between IHL and Islamic law

Operational research and experience show that efforts to strengthen respect for IHL through dialogue on the cultural and religious values that underpin it can strengthen respect for the law, including on the protection of detainees.⁶ This finding has long been reflected in the work of humanitarian organizations. For about three decades, the ICRC has involved Islamic institutions and scholars in its efforts to protect and assist victims of armed conflict and to build “bridges between cultures, religions and IHL ... so as to promote adherence to IHL in armed conflicts”.⁷ Likewise, researchers and other humanitarian practitioners have concluded that many NSAGs use “local customs, beliefs and values, whether secular or religious, to control the behaviour of the rank and file”, suggesting that “common values [between these beliefs and values and international rules] can be mobilized to engage [NSAGs] towards compliance”.⁸

In this effort to strengthen respect for IHL, Islamic law is of particular importance for several reasons. First, Islamic law is one of the oldest legal systems in existence and contains detailed rules regulating warfare, including on the protection of detainees. Even with regard to State and non-State parties to armed conflict who accept IHL as a legal obligation, Islamic law is an additional source of influence on their behaviour. Ignoring Islamic law as a source of influencing behaviour for a substantial percentage of parties to contemporary armed conflict would be a lost opportunity.

Second, as one of the present authors has explained in his previous work, compliance with the Islamic regulations of war is an act of worship which brings

6 ICRC, above note 4, p. 65.

7 ICRC, *ICRC Strategy 2024–2027*, November 2023, p. 13, available at: www.icrc.org/en/publication/4745-icrc-strategy-2024-2027; Peter Maurer, “International Conference on Islam and IHL – Statement by the ICRC”, 8 December 2016, available at: www.icrc.org/en/document/speech-icrc-president-international-conference-islam-and-ihl; Ahmed Al-Dawoody, *IHL and Islamic Law in Contemporary Armed Conflicts – Experts’ Workshop*, Geneva, 29–30 October 2018, ICRC, Geneva, 2019, p. 9.

8 Annysa Bellal, Pascal Bongard and Ezequiel Heffes, *From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms: Research and Policy Conclusions*, Geneva, 2022, p. 37, available at: https://words2deeds.org/wp-content/uploads/2022/09/Words2Deeds_comparative-study.pdf.

a Muslim soldier closer to God. Respect for the Islamic law of war is something that Muslims should instinctively impose on themselves through their desire to obey God, regardless of whether their enemy adheres to the same rules. This is an incentive for compliance that is notably different to a sense of obligation stemming from international conventions. As a result, Islamic law has great power to influence the conduct of Muslim parties to conflicts and fighters who follow Islamic laws of armed conflict as their source of reference.⁹

Third, while all Muslim-majority States and States in which Islamic law is the dominant domestic legal system have ratified the Geneva Conventions and regard the obligations therein as legally binding and compatible with Islamic law, certain NSAGs do not. However, some are willing to have a dialogue on commonalities and differences between IHL and Islamic law, and to abide by IHL rules that are based on or in agreement with Islamic law. In fact, in our experience many take pride in the fact that Islamic law predates the Geneva Conventions by more than thirteen centuries.

With such groups, legal messages or dialogue on the protection of detainees are most effective when drawing on the sources of restraint that these groups accept. Such dialogue is of particular legal and operational significance for identifying the areas of agreement between IHL and Islamic law and thereby ensuring that detainees are treated humanely. At the same time, identifying areas of disagreement between IHL and the interpretation of Islamic law followed by interlocutors is important for entering into a constructive dialogue that fosters mutual understanding and can help to eventually minimize disagreements. In our experience, interpretations of Islamic law that diverge from IHL are frequently based on certain pre-modern Islamic legal opinions or precedents, or on interpretations that give too much weight to arguments or calculations based on military necessity.

Against this background, the analysis presented in this article aims to strengthen the understanding of IHL and Islamic law scholars on the protection of detainees under those two respective legal frameworks. On the one hand, it provides scholars from each body of law with an assessment of the rules protecting detainees under their legal framework of reference. While IHL rules on the protection of detainees are today widely accessible and known, this is not the case for the Islamic law rules regulating armed conflict. On the other hand, this article is structured in a way that allows for an easy comparison of the relevant rules of each body of law, making it possible for arms carriers, experts and humanitarian practitioners from each body of law to understand how the other body address this legal issue.

Ultimately, this approach aims to facilitate and strengthen the work of legal and humanitarian professionals dedicated to protecting the lives and dignity of detainees, and hopes to be of practical value. As Antoine Grand, an ICRC head of delegation who has worked in different Muslim contexts, explains:

9 Ahmed Al-Dawoody, "Islamic Law and International Humanitarian Law: An Introduction to the Main Principles", *International Review of the Red Cross*, Vol. 99, No. 906, 2017, pp. 999–1000.

Enhancing respect for civilians, prisoners and the wounded is also about building bridges between the state-centric Geneva Conventions and other corpora of law. It requires a profound understanding of the context, its religion, cultures, languages and issues underlying the related conflicts. It is about educating ourselves as humanitarian organizations, and showing humility. It takes time, patience and perseverance to construct such understanding and true dialogue. It is nonetheless indispensable if we seek to influence behaviour for better respect of IHL.¹⁰

Comparing apples to oranges? Preliminary questions on the protection of detainees in times of armed conflict under IHL and Islamic law

Under IHL and Islamic law, the protection of detainees during armed conflict depends on a number of preliminary legal determinations, such as which legal obligations a party is bound by, which legal obligations apply in a specific armed conflict and which lawful options a detaining party has in determining the fate of a detainee. This section presents brief explanations of these fundamental issues, which are important for understanding the remainder of the analysis.

The obligation to observe agreements

A cardinal principle of international law is that “every treaty in force is binding upon the parties to it and must be performed by them in good faith” (*pacta sunt servanda*).¹¹ In IHL, this principle is reflected in the obligation to “respect and to ensure respect for” IHL. This obligation is set out in Article 1 common to the four Geneva Conventions (common Article 1) and reflects customary IHL, which binds State and non-State parties to armed conflict.¹² Among other things, this means that international legal obligations prevail over potentially conflicting national, religious or internal rules of parties to armed conflicts. In other words, under international law, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”;¹³ likewise, compliance with religious law cannot be a legally valid excuse for violating international law.

10 See Ahmed Al-Dawoody, “International Humanitarian Law and Islamic Law: A Principled and Inclusive Dialogue”, *Humanitarian Law and Policy Blog*, 25 July 2024, available at: <https://blogs.icrc.org/law-and-policy/2024/07/25/international-humanitarian-law-and-islamic-law-a-principled-and-inclusive-dialogue/>.

11 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980) (VCLT), Art. 26.

12 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 139, available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules>. For further discussion of how IHL binds NSAGs, see ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2021 (ICRC Commentary on GC III), paras 539–542.

13 VCLT, above note 11, Art. 27.

Islamic law similarly requires that agreements must be adhered to. This is dictated in the Qur'an (2:177, 3:76, 4:90, 5:1, 8:72, 13:20, 16:91–94, 17:34) and reflected in, for example, the Sunnah of the Prophet Muhammad;¹⁴ it is an elementary principle which includes adherence to international legal agreements.¹⁵ Under Islamic law, Muslims may enter into any treaty with the exclusion of provisions that blatantly contradict the tenets of Islamic law,¹⁶ which is not the case regarding IHL.¹⁷

Consequently, all Muslim-majority States that have ratified the Geneva Conventions or other international law treaties are obliged to respect them, both under international law and under Islamic law. Once a Muslim State signs an agreement (which presupposes that it considers that the agreement generally aligns with Islamic law), this agreement prevails in potential conflicts with Islamic law obligations. Thus, if there are issues on which Islamic law (or certain schools or interpretations of Islamic law) and IHL provide different protection standards for detainees, Muslim-majority States are – under Islamic law – bound by their international law obligations.

While NSAGs are not parties to IHL treaties, under IHL “it is today accepted” that both relevant IHL treaty law and customary law are “binding on non-state armed groups”.¹⁸ Yet, because NSAGs are not parties to IHL treaties, the Islamic law principle that agreements must be adhered to might not be as easily relied on with such groups. In some cases, Islamic NSAGs may have entered into agreements

14 On the principle of *pacta sunt servanda* from an Islamic law perspective, see Mahmoud Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, Cambridge University Press, New York, 2014, p. 154; Syed Sharifuddin Pirzada, “Islam and International Law”, in Altaf Gauhar (ed.), *The Challenge of Islam*, Islamic Council of Europe, London, 1978; C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan, Basingstoke, 1988, pp. 132–133; Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study*, Graham & Trotman, London, 1994, pp. 12–13; Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the “Clash of Civilizations” in the New World Order*, Hart, Oxford, 2005, p. 46; Emilia Justyna Powell and Sara McLaughlin, “The International Court of Justice and the World’s Three Legal Systems”, *Journal of Politics*, Vol. 69, No. 2, 2007, pp. 400–401. On the subject of “[h]onouring covenants and commitments, as long as the other party is faithful to its own pledges (*pacta sunt servanda*)”, Wahbah al-Zuhayli writes: “This is the basis for building up trust, esteem and respect. Islam therefore prohibited perfidy and treason in all circumstances. Many Qur’anic verses made the fulfilment of covenants, contractual obligations or promises mandatory. For example, Almighty God says: ‘Ye who believe! Fulfil (all) obligations’ and ‘Fulfil the Covenant of God when ye have entered into it, and break not your oaths after ye have confirmed them, indeed ye have made God your surety, for God Knoweth all that ye do’” Wahbeh al-Zuhili [Wahbah al-Zuhayli], “Islam and International Law”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 275.

15 However, very few Islamic NSAGs reject adherence to such international legal agreements under the pretext that such agreements were entered into by illegitimate authorities.

16 Ramin Moshtaghi, “Relation between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran – A Multilayer System of Conflict”, *Max Planck Yearbook of United Nations Law*, Vol. 13, 2009, p. 420.

17 Niaz A. Shah, “Foreword”, in Muhammad-Basheer A. Ismail (ed.), *Islamic Law and Transnational Diplomatic Law: A Quest for Complementarity in Divergent Legal Theories*, Palgrave Macmillan, London, 2016, p. xi. In contrast, scholars have pointed out with regard to human rights law treaties that “many Islamic states only ratify the treaties with the caveat that any obligation sustained must first be compatible with Islamic law”. Anne F. Bayefsky, “The U.N. Human Rights Treaties: Facing the Implementation Crisis”, *Windsor Yearbook of Access to Justice*, Vol. 15, 1996, p. 189.

18 ICRC Commentary on GC III, above note 12, para. 539 with relevant sources in fn. 235.

on specific issues (such as the prohibition of the use of landmines) and, as a result, are bound under Islamic law to comply with those agreements.¹⁹ Some of these groups might also recognize that they have international legal obligations that must be complied with. Other groups, however, might reject international law, for instance because they do not consider themselves bound by anything that is not divine law but human-made.²⁰

The notion of armed conflict under IHL and Islamic law

Under IHL and under Islamic law, legal rules on the protection of detainees are defined in relation to different types of armed conflict. Thus, under each body of law, an assessment of facts is required to determine the applicable obligations. Each body of law considers different facts legally relevant.

Under IHL, the applicable rules depend on two key questions: first, whether a person is held in time of peace or in the context of an armed conflict, and second, if the person is held in the context of an armed conflict, whether this conflict is between two or more States (i.e., an international armed conflict), on the one hand, or between a State and one or more NSAGs, or between NSAGs (i.e., a NIAC), on the other.²¹ Under IHL, to determine whether a NIAC exists, two elements must be examined, namely “the intensity of the conflict and the organization of the parties to the conflict”.²² If these criteria are met, common Article 3 and customary IHL rules apply and bind all parties to the conflict, be they States or NSAGs. Moreover, if a situation of violence meets the criteria defined in Article 1(1) of AP II, additional rules apply.²³ Determining what type of armed conflict exists and which rules

19 For example, the Moro Islamic Liberation Front in the Philippines signed the Deed of Commitment banning anti-personnel mines and incorporated relevant provisions into their code of conduct following recommendations from Geneva Call. See Geneva Call, *The Third Meeting of Signatories to Geneva Call's Deeds of Commitment: Summary Report*, Geneva, 17–20 November 2014, p. 13, available at: <https://genevacall.org/wp-content/uploads/2023/06/3rd-Meeting-of-Signatories-Report-1.pdf>.

20 See, for instance, A. Bellal, P. Bongard and E. Heffes, above note 8, p. 29.

21 For an explanation of the notion of “international armed conflict”, see ICRC Commentary on GC III, above note 12, paras 243–277. For an explanation of the notion of “non-international armed conflict”, see *ibid.*, paras 427–536. See also ICRC, “How Is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, *International Review of the Red Cross*, Vol. 106, No. 925, 2024.

22 ICRC Commentary on GC III, above note 12, para. 461. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, para. 562.

23 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1(1), states: “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

apply requires a case-by-case analysis in light of the prevailing facts.²⁴ The (alleged or real) motivations of the parties to the conflict – be they political, religious or other – are irrelevant in this assessment.²⁵ Similarly, labelling the adversary as “terrorist” or accusing them of committing acts of terrorism does not affect the legal classification of a situation as a NIAC and the resulting rules that apply.²⁶

Under Islamic law, there are a few specific rules, discussed below, pertinent to detention that apply to armed conflict between the caliphate State and an adversary from outside the caliphate, on the one hand, and armed conflicts within the caliphate State, on the other. During the formative period of Islamic law (the seventh to tenth centuries AD, the first four centuries of the Islamic era), Muslims were, at least theoretically, living under the rule of one government: the caliphate State.²⁷ Therefore, any armed conflict inside the caliphate State meant fighting mainly between Muslims. In contrast, any conflict between the caliphate State and an adversary from outside the caliphate would generally be between Muslims and non-Muslims. While there is today no longer a caliphate State and some of the rules pertinent to this extinct paradigm have become obsolete, certain weapons bearers who use Islamic law as their source of reference do invoke these rules.

In the category of armed conflicts within the caliphate State, classical Muslim jurists differentiate between four different subcategories of conflicts: wars of apostasy, fighting against the *khawārij* (roughly translated as violent religious fanatics), war against the *muḥaribūn* (meaning terrorists, bandits, pirates), and fighting against *bughāh* (armed rebels, secessionists). The category that is most relevant for the purpose of this article is fighting against *bughāh*. For a group of arms carriers to be classified as *bughāh*, they must fulfil three conditions: (1) *shawkah*, *man’ah*, *fay’ah*, which means military power and organization; (2) a *ta’wīl*, meaning a justification for the fighting such as a complaint of injustice inflicted upon them by the government, or a belief that the government has violated the *sharī’ah*, or a disagreement with government policies; and (3) *khurūj*, which means an actual use of force by the rebels.²⁸ For this subcategory, classical Muslim jurists stipulated more protective and stricter rules of engagement than for any of the other three categories of armed conflict within the caliphate, and for conflict between the caliphate State

24 See, for instance, ICTY, *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66, Judgment (Trial Chamber), 30 November 2005, para. 84.

25 ICRC Commentary on GC III, above note 12, paras 482–485.

26 *Ibid.*, paras 904–908. See also Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 499, para. 10.28.

27 The notion of “caliphate” refers to “the political-religious state comprising the Muslim community and the lands and peoples under its dominion in the centuries following the death (632 CE) of the Prophet Muhammad”. The caliphate was officially abolished on 3 March 1924. Asma Afsaruddin, “Caliphate”, *Encyclopaedia Britannica*, available at: www.britannica.com/place/Caliphate. For a concise discussion on the history and the Islamic constitutional theory of the caliphate, see Muhammad Qasim Zaman, “Caliphate”, in Richard C. Martin *et al.* (eds), *Encyclopedia of Islam and the Muslim World*, Vol. 1, Macmillan Reference, New York, 2004, pp. 116–123.

28 Muhammad al-Khatīb al-Shirbīnī, *Al-Iqnā’ fi Hall al-Fāz Abī Shujā’*, ed. Maktab al-Buhūth wa al-Dirasāt, Vol. 2, Dār al-Fikr, Beirut, 1994, pp. 547–548; Muhyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’ Sharh al-Muḥadhdhab*, ed. Mahmūd Matrajī, Vol. 20, Dār al-Fikr, Beirut, 2000, pp. 348–349; Ahmad ibn Idrīs al-Qarāfī, *Al-Dhakhīrah*, ed. Muhammad Būkhūzbah, Vol. 12, Dār al-Gharb al-Islāmī, Beirut, 1994, p. 6;

and an adversary from outside the caliphate. For example, and importantly for this article, unlike in the case of conflict between the caliphate State and an external adversary, in conflicts involving *bughāh*, captured arms carriers (i.e., “armed rebels” or government soldiers) must not be killed and must be set free after the cessation of hostilities. Injured arms carriers must not be killed when captured; additionally, they and their women and children must not be enslaved, and their property must not be taken as the spoils of war. Understanding these rules is key in a dialogue with weapons bearers who use Islamic law as their source of reference.

Deciding the fate of detainees

For any detainee captured in the context of an armed conflict, the question of who decides whether they may be kept in detention or must be released and whether they are punished for their participation in hostilities or any alleged crime, and according to which rules such decisions are taken, is of greatest importance. Thus, understanding the legal framework for deciding the fate of a detainee is essential to ensuring that people are not detained arbitrarily, held as hostages, or unlawfully punished or executed. While this article does not provide a detailed comparison between judicial safeguards under IHL and Islamic law, the following paragraphs provide a basic overview of the IHL and Islamic law rules relevant for deciding the fate of a detainee.

IHL references two types of detention in NIAC: internment (i.e., detention for imperative reasons of security) and criminal law detention.²⁹ For each type of detention, either procedural safeguards (internment) or judicial guarantees (criminal law detention) apply.³⁰ While IHL provides significant detail on judicial guarantees for any detainee that is prosecuted for alleged violations of criminal law in the context of an armed conflict,³¹ rules on the reasons for which a person may be interned, and according to which procedures, are not defined in IHL applicable in NIAC. A fundamental obligation for all parties to armed conflicts is, however, that detainees must not be held arbitrarily.³² In addition, detainees must not be executed, except if lawfully convicted and sentenced to death in a trial respecting all indispensable judicial guarantees,³³ and hostage-taking or enslaving detainees is absolutely

Mansūr ibn Yūnus ibn Idrīs al-Buhūti, *Al-Rawḍ al-Murbiʿ: Sharḥ Zād al-Mustaḥṣi*, Vol. 3, Maktabah al-Riyadh al-Hadīthah, Riyadh, 1970, p. 335; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, paperback ed., Cambridge University Press, Cambridge, 2006, pp. 151, 242–243.

29 See, for instance, AP II, Art. 5, which sets out rules for all detainees, “whether they are interned or detained”.

30 See ICRC Commentary on GC III, above note 12, Art. 3, paras 710–732 (for criminal law detention), 754–765 (for internment).

31 See, in particular, common Art. 3; APII, Art. 6; ICRC Customary Law Study, above note 12, Rules 100–102.

32 ICRC Customary Law Study, above note 12, Rule 99.

33 Importantly, Article 6(4) of AP II stipulates that “[t]he death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children”.

prohibited.³⁴ A detainee must be released as soon as the reasons for the deprivation of their liberty cease to exist.³⁵

Under classical Islamic law, detention of adversaries in the context of an armed conflict is considered permissible if it is in the interest of the Muslim party or required by war conditions or military and security concerns. The decision on the fate of detainees rests with the Muslim ruler (i.e., the authority, not individual soldiers or commanders) and does not require an authorization by the judiciary. In the category of conflicts within the caliphate State that is discussed in this paper (i.e., fighting against *bughāh*), detainees must not be killed or enslaved, and their property must not be taken as spoils of war.³⁶ With regard to a conflict with an adversary from outside the caliphate, however, different views existed among classical Islamic jurists on what the Muslim ruler may decide regarding the fate of a detainee. One group of Muslim jurists advocated that detainees be set free graciously or exchanged for Muslim prisoners, while other jurists argued that the Muslim ruler may decide what serves the best interests of Muslims: setting prisoners of war (PoWs) free, executing some or all of them, enslaving them, or exchanging them for Muslim prisoners or for money.³⁷ Islamic law does not require the involvement of a court in any of these decisions, but the Muslim ruler should consult with recognized Islamic legal authorities – such as those whose political views are trusted and those with expertise in war – before taking a decision.

The obligation of humane treatment and the prohibition against violence to life and person

If captured in the context of an armed conflict, detainees find themselves in the hands of “the enemy”, which makes them particularly vulnerable. While it is unfortunately true that detainees are frequently treated inhumanely and subjected to horrendous acts, such acts are clear violations of both IHL and Islamic law. Both bodies of law require the humane treatment of detainees.

Under IHL, States have agreed on a number of rules to protect the life and dignity of detainees.³⁸ Accordingly, it is said that the obligation to treat detainees

34 Common Art. 3; AP II, Art. 4(2)(c), (f); ICRC Customary Law Study, above note 12, Rules 94, 96.

35 ICRC Customary Law Study, above note 12, Rule 128.

36 Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, pp. 164–165.

37 See, for example, *ibid.*, pp. 136–138; Lena Salaymeh, “Early Islamic Legal-Historical Precedents: Prisoners of War”, *Law and History Review*, Vol. 26, No. 3, 2008; Muhammad Munir, “Debates on the Rights of Prisoners of War in Islamic Law”, *Islamic Studies*, Vol. 49, No. 4, 2010; Troy S. Thomas, “Prisoners of War in Islam: A Legal Inquiry”, *The Muslim World*, Vol. 87, No. 1, 1997; Troy S. Thomas, “Jihad’s Captives: Prisoners of War in Islam”, *US Air Force Academy Journal of Legal Studies*, Vol. 12, 2003.

38 In international armed conflict, these rules are primarily defined in Geneva Convention III. In NIAC, these rules are found in common Art. 3, AP II and customary IHL.

humanely is one of the “leitmotifs” of IHL.³⁹ This obligation is found in common Article 3, Article 4(1) of AP II and customary IHL.⁴⁰

Under Islamic law, human dignity is an inherent feature of every person irrespective of religion, gender, ethnicity or other factors. The Qur’an (17:70, 2:30–33) contains the concept of human dignity. In Islam, humankind is the representative of God on earth and is entrusted with the duty of protecting the universe and contributing to human civilization. Thus, all human beings share the same dignity and the only assessment of people in God’s sight is piety.⁴¹ Therefore, in all conflicts the bottom line is that there must be a minimum of humane treatment of detainees, irrespective of differences in religion or the different categories of armed conflict.

In the context of armed conflict, most of the Islamic law rules on the treatment of detainees are based on how the seventy non-Muslim prisoners captured during the Battle of Badr in 624 AD were treated. In that battle, as noted at the start of this article, the Prophet Muhammad instructed that the prisoners be treated well, saying: “Observe good treatment towards the prisoners.”⁴² The humane treatment which these prisoners received regarding shelter, food, clothes etc., as shown below, served as the basis for the rules developed by the classical Muslim jurists, which still apply to Muslim arms carriers today. Importantly, the rules that were originally applied in wars between the caliphate State and non-Muslim adversaries today apply also to armed conflicts between Muslims.

In addition to the general obligation to treat detainees humanely, IHL and Islamic law contain a number of rules that specifically prohibit violence to life and person as well as other violations of a detainee’s fundamental rights. These shall be examined in the following sections.

Importantly, two points must be borne in mind during this analysis. Firstly, while IHL and Islamic law do not set out similar obligations, complying with one body of law does not require violating the other; for instance, complying with Islamic law does not require a Muslim arms carrier to breach an IHL obligation, or vice versa. Secondly, compliance with one body of law cannot be an excuse for violating the other – concretely, compliance with a rule of Islamic law that is more permissive than an IHL rule cannot be a valid excuse for violating IHL, or a valid legal defence in a court of law against war crime allegations.

The prohibition against killing detainees

One of the most fundamental rules on the protection of detainees is the prohibition of murder. In IHL applicable in NIAC, murder is prohibited under common Article 3, Article 4(2) of AP II and customary IHL.⁴³ This prohibition applies to the

³⁹ Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Times of War*, ICRC, Geneva, 1958, p. 204.

⁴⁰ ICRC Customary Law Study, above note 12, Rule 87.

⁴¹ Qur’an 49:13.

⁴² M. I. J. al-Ṭabarī, above note 1, p. 39.

⁴³ ICRC Customary Law Study, above note 12, Rule 89.

“intentional killing or causing death of [a detainee], as well as the reckless killing or causing of their death”.⁴⁴ The prohibited conducts can consist of acts (such as shooting a detainee) or omissions (such as not providing a detainee with needed food or medical care).⁴⁵ A death sentence passed or an execution carried out without a fair trial also constitutes murder.⁴⁶

Under Islamic law, detained non-State forces who qualify as *bughāh*, and who abide by the strict rules of engagement under Islamic law described above, must not be killed. Committing any acts of terrorism before, during or after the hostilities disqualifies the perpetrator from treatment under the Islamic law rules applicable to the fight against *bughāh* and necessitates prosecuting them for the crime of *ḥirābah* (terrorism).⁴⁷

In contrast, in a conflict with an adversary from outside the caliphate, classical Muslim jurists hold diverging views about whether detainees may or may not be killed, as discussed above. It must be noted, however, that the legal argument on the permissibility of the execution of prisoners in cases where it would serve the Muslims’ interest is based only on the execution of three prisoners during the lifetime of the Prophet. These were al-Naḍr ibn al-Hārith and ‘Uqbah ibn Abī Mu‘ayyāt during the Battle of Badr in March 624 AD, and Abū ‘Azzah al-Jumāḥī at the battle of Uḥud in March 625 AD. These three individuals were treated differently than the other prisoners because of crimes they had committed; they were not executed simply because they were prisoners. This suggests that the killing of these three persons cannot be regarded as a general permission to kill prisoners; otherwise, the rest of the prisoners captured would have also been killed.⁴⁸ As noted by one of the present authors, “[t]herefore, we can conclude on this issue that today Islamic law should be interpreted as outlawing the killing of POWs, in line with the requirement of humane treatment clearly established under Islamic law.”⁴⁹

As said above, Muslim jurists unanimously agree that in fighting against *bughāh*, captured arms carriers from both sides must not be killed. In some cases,

44 ICRC Commentary on GC III, above note 12, para. 635.

45 *Ibid.*, para. 635.

46 *Ibid.*, para. 630.

47 For further information, see, for example, A. Al-Dawoody, above note 36, pp. 147–196; Ahmed Al-Dawoody, “Internal Hostilities and Terrorism”, in Niaz A. Shah (ed.), *Islamic Law and the Law of Armed Conflicts: Essential Readings*, Edward Elgar, Cheltenham, 2015; Ahmed Al-Dawoody, “International Terrorism and the Jurisdiction of Islamic Law”, *International Criminal Law Review*, Vol. 15, No. 3, 2015; Ahmed Al-Dawoody, “Non-International Armed Conflicts under Islamic Law: The Case of ISIS”, in Tallyn Gray (ed.), *Islam and International Criminal Law and Justice*, Nuremberg Academy Series No. 2, Torkel Opsahl Academic EPublisher, Brussels, 2018; Ahmed Al-Dawoody, “Terrorism, Religious Violence, and the Shari’ah”, in Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (eds), *Routledge Handbook of Islamic Law*, Routledge, London and New York, 2019.

48 See, for example, A. Al-Dawoody, above note 9, p. 1012; M. Munir, above note 37; L. Salaymeh, above note 37, pp. 524 ff.; Muḥammad Ḥusayn Haykal, *The Life of Muḥammad*, trans. from the 8th ed. by Isma‘il Rāḡī A. al-Fārūqī, North American Trust, 1976, pp. 233, 239; T. S. Thomas, above note 37, pp. 94 ff.; T. S. Thomas, above note 37, p. 49.

49 Ahmed Al-Dawoody, “GCIII Commentary: An Islamic Perspective on the Treatment of Prisoners of War”, *Humanitarian Law and Policy Blog*, 26 January 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/01/26/gciii-commentary-islamic/>.

Islamic NSAGs have also excommunicated their Muslim enemies, meaning that they label them as apostates and thereby aim to justify executions. Such conduct is problematic on different levels, including because Islamic law should not be interpreted as providing a blanket justification for executing detainees even in armed conflicts against non-Muslim adversaries. Therefore, recalling these classical Islamic laws of war in dialogue with Islamic NSAGs who use Islamic law as their source of reference may help these groups to reconsider and potentially change their understanding regarding the legality of killing detainees.

Torture and cruel, inhuman or degrading treatment

Under IHL applicable in NIAC, torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited under common Article 3, Article 4(2) of AP II and customary IHL.⁵⁰ Such treatment is absolutely prohibited, meaning that there are no circumstances – including reprisals for unlawful acts committed by the adversary – that can justify acts of torture or inhuman or cruel treatment or punishment.

For the purposes of IHL, torture is defined as encompassing three elements: first, it must consist of an act that causes severe pain or suffering, whether physical or mental, to the person on whom it is inflicted; second, the act must be intentional; and third, the act must be instrumental for a specific purpose, such as the extraction of information or a confession, or the intimidation, discrimination or punishment of a person.⁵¹ Cruel or inhuman treatment can be defined as treatment that causes physical or mental suffering of a serious nature (the seriousness is to be assessed on a case-by-case basis);⁵² contrary to torture, no specific purpose is required. Degrading treatment, also referred to as “outrages upon personal dignity”, has been defined as “act[s] or omission[s] which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity”.⁵³

Under Islamic law, the instructions of the Prophet Muhammad to treat non-Muslim prisoners humanely must be interpreted as also setting out a prohibition against torture and cruel, inhuman or degrading treatment. This interpretation of the Prophet’s instructions is reflected in the practice of the Companions of the Prophet, who treated prisoners well.⁵⁴ Indeed, the Prophet Muhammad said: “God will torture [in the Afterlife] those who torture people in this life.”⁵⁵ Therefore,

⁵⁰ ICRC Customary Law Study, above note 12, Rule 90.

⁵¹ ICRC Commentary on GC III, above note 12, paras 662–681.

⁵² *Ibid.*, paras 651–659.

⁵³ *Ibid.*, paras 700–709. Also, note that the prohibition against outrages upon personal dignity, in particular humiliating and degrading treatment, has also been found to include those committed against dead persons: *ibid.*, para. 704.

⁵⁴ See, in particular and as discussed further below, the practice of Muslim captors regarding the provision of shelter and clothing, which protected detainees from suffering and humiliation.

⁵⁵ Hadith 2613 in Muslim ibn al-Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fū’ād ‘Abd al-Bāqī, Vol. 4, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1995, p. 2018.

torturing detainees, even to obtain military intelligence about the enemy, is prohibited. Accordingly, when one of the most prominent jurists in Islamic history, Mālik ibn Anas (d. 795), the eponymous founder of the Mālikī school of law, was asked, “Is it possible to torture a prisoner of war in order to obtain military intelligence about the enemy?”, his answer was, “I have not heard of that.”⁵⁶

During the lifetime of the Prophet Muhammad, there was no fighting within the caliphate States (meaning between Muslims) and hence there are no details about the treatment of Muslim detainees by Muslim captors. During captivity, however, they must receive the same humane treatment as set out in Islamic law rules applicable to war between the caliphate State and non-Muslim adversaries.

Note, however, that some Muslim jurists argue for the permissibility of reciprocity in treatment. For example, Qur’an 16:126 states: “If you punish, then punish with the like of that with which you were punished.” This might be misunderstood by some as allowing torture and other forms of ill-treatment in response to similar behaviour by the adversary; however, in this context reciprocity must not be understood as allowing or justifying the commission of crimes prohibited under Islamic law, even if the adversary commits such crimes.⁵⁷

In addition, outside the context of armed conflict, there has been debate and conflicting legal opinions among Islamic jurists over the permissibility of beatings of suspected notorious criminals to obtain confessions for investigation purposes or judicial proceedings.⁵⁸ A number of scholars, including the Shāfi‘ī jurist al-Māwardī (d. 1058), the Ḥanbalī jurist Ibn Taymiyyah (d. 1328), and the latter’s student Ibn Qayyim al-Jawziyyah (d. 1350), took the position that the beating of suspected dangerous criminals such as thieves, armed robbers or murderers is permitted. Al-Māwardī argued that this permission is given to the ruler but not the judge in cases of serious crimes. In contrast, Abū Ḥamid al-Ghazālī (d. 1111) argued that human dignity is sacrosanct and therefore no punishment whatsoever could be inflicted on a suspected criminal until proven guilty.⁵⁹ Moreover, any confessions under coercion

56 Abu ‘Abdullah Muhammad b. Yusuf al-Mawwaq al-Maliki, *Al-Taj wa al-Iklil li Mukhtasar Khalil*, Vol. 4, Dar al-Kutub al-Ilmiyyah, Beirut, 1994, p. 548; Wahbah al-Zuhaylī, *Āthār al-Ḥarb fi al-Islām: Dīrāsah Muqāranaḥ*, 3rd ed., Dār al-Fikr, Damascus, 1998, p. 415.

57 In the words of Dr Wahbah al-Zuhaylī, “[a]lthough the principle of reciprocity is an ancient one, Islam embraced it in dealing with others in time of peace and war alike to make justice reign, establish standards of fairness and impartiality, and ensure that the enemy would not overstep limits in its deeds and conduct. However, if the fundamental ethical and moral principles are breached, Muslims should not do the same.” W. al-Zuhili, above note 14, p. 275. On reciprocity, see also, for example, Matthias Vanhullebusch, “Reciprocity under International Humanitarian Law and the Islamic Law of War”, *Journal of Islamic State Practices in International Law*, Vol. 11, No. 1, 2015; Karima Bennouna, “As-Salāmu ‘Alaykum? Humanitarian Law in Islamic Jurisprudence”, *Michigan Journal of International Law*, Vol. 15, No. 2, 1994, p. 622; Kathryn A. Miller, “Reflections on Reciprocity: A Late Medieval Islamic Perspective on Christian-Muslim Commitment to Captive Exchange”, in Francesca Trivellato, Leor Halevi and Catia Antunes (eds), *Religion and Trade: Cross-Cultural Exchanges in World History, 1000–1900*, Oxford University Press, New York, 2014.

58 See Sadiq Reza, “Torture and Islamic Law”, *Chicago Journal of International Law*, Vol. 8, No 1, 2007.

59 *Ibid.*, pp. 24–25; Muḥammad Bin Ṭārīah, ‘Abbās ‘Wruah and Yūsuf Bajāwī, *Tārīkh al-Ta’dhib wa Uṣūl Tahrimih fi al-Islām*, Markaz al-Rāyah lil-Tanmiyah al-Fikriyyah, Jeddah, 2003, pp. 72–73.

will be null and void under Islamic law and, as a rule, a person will not be liable for any acts committed under coercion.

Enforced disappearance

In IHL applicable in NIAC, enforced disappearance is prohibited under customary IHL.⁶⁰ As there is no definition of the act of “enforced disappearance” in IHL treaties, for the purposes of this article the following definition is used: enforced disappearance covers arrest, detention, abduction or any other form of deprivation of liberty, followed by a refusal by the detaining authority to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places a person outside the protection of the law.⁶¹ While IHL treaties do not explicitly prohibit enforced disappearance as such, the ICRC Customary Law Study finds that such prohibition can be inferred from several treaty and customary IHL rules which the act of enforced disappearance violates or threatens to violate, such as the prohibitions against arbitrary detention, torture and other cruel or inhuman treatment, and murder. Moreover, IHL obliges detaining authorities to respect family life, to allow detainees to correspond with their families and to take all feasible measures to account for persons reported missing as a result of armed conflict, and detaining authorities must provide family members with any information they have on the missing person’s fate.⁶² Disappearing a person will violate several of these rules.

The issue of enforced disappearance is not explicitly addressed under Islamic law either, but an act of enforced disappearance will violate various rules of Islamic law, such as those relating to the good treatment of detainees and the rights of both the disappeared persons and their families. For example, under Islamic law, if a person goes missing, a judge shall instruct the police to search for that person. Thus, there is an obligation for the Islamic authorities to clarify the fate and whereabouts of missing persons. Concealing their fate or whereabouts is a violation of this obligation.

Moreover, respect for the Islamic law rules on judicial review and the management of prisons would prevent enforced disappearances. The Ḥanafī jurist Abū Yūsuf (d. 798), the first to hold the position of *qaḍī al-quḍāh* (chief justice, lit. “judge of the judges”) in Islamic history, wrote in his famous legal and policy treatise advising Caliph Harūn al-Rashīd (d. 809) about the Islamic regulations on the financial resources of the State and other issues related to governance that the number of prisoners was increasing because of the delay in adjudicating/reviewing their

60 ICRC Customary Law Study, above note 12, Rule 98.

61 This definition is inspired by the International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010), Art. 2. However, the Convention frames the definition within more limited scope, indicating as acts of enforced disappearance only those committed “by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State”. In this article, and in light of the fact that both States and NSAGs are bound by IHL, we use a broader understanding of enforced disappearance, rejecting a limitation of the definition to States.

62 See ICRC Customary Law Study, above note 12, Rules 105, 117, 125.

cases; he therefore advised the caliph to issue instructions that the prisoners' cases be adjudicated/reviewed every day.⁶³ Some jurists argued that as soon as they take the duties of their job from their predecessors, judges should acquire a list of prison inmates and the status of their cases and situations.⁶⁴ For example, a century later, in one of the seminal works on the Islamic legal literature on *adāb al-qāḍī* (rules of judgeship), the Ḥanafī jurist Aḥmad ibn 'Umar al-Khaṣṣāf (d. 874) stated that upon assuming office,

every *qadi* [judge] must visit the prisons, record the names of inmates and the dates of their imprisonment, and inquire into the reason for each inmate's imprisonment. The *qadi* must ask each inmate himself why he is detained, and if any inmate claims his imprisonment is unlawful, the *qadi* must investigate further.⁶⁵

Such visits and reviews are one measure to prevent disappearances.

Rape and other forms of sexual violence

Under IHL applicable in NIAC, rape and other forms of sexual violence are prohibited under common Article 3,⁶⁶ Article 4(2) of AP II and customary IHL.⁶⁷ The term "sexual violence" is commonly used to describe "any act of a sexual nature committed against a person under any circumstances which are coercive".⁶⁸ Coercive circumstances include the use of force, the threat of force, or coercion caused, for example, by fear of violence, duress, detention, psychological oppression or abuse of power.⁶⁹ They also include situations "where the perpetrator takes advantage of a coercive environment or a person's incapacity to give genuine consent",⁷⁰ which may be the case in a place of detention.

Sexual acts are strictly regulated under Islamic law.⁷¹ Under Islamic law applicable to fighting within the caliphate State, women must not be enslaved. In addition, rape and any coercive act of a sexual nature accompanied by the use of force falls under the crime of terrorism.⁷²

63 Abū Yūsuf Ya'qūb ibn Ibrāhīm al-Anṣārī, in Ṭaha 'Ab Al-Ra'ūf Sa'ad and Sa'ad Ḥasan Muḥammad (eds), *Al-Kharāj*, Al-Maktabah al-Azhariyah lil-Turāth, Cairo, p. 164.

64 Nizām al-Dīn al-Birnhābūrī al-Balkhi *et al.*, *Al-Fatāwā al-Almakiriyah al-Ma'rūfah bi al-Fatāwā al-Hindiyyah*, Vol. 3, Al-Maṭba'ah al-Amīriyyah, Cairo, 1893, p. 3346.

65 Cited in Sadiq Reza, "Due Process in Islamic Criminal law", *George Washington International Law Review*, Vol. 46, No. 1, 2013, p. 24.

66 See ICRC Commentary on GC III, above note 12, paras 673, 679, 732–743.

67 ICRC Customary Law Study, above note 12, Rule 93.

68 ICRC Commentary on GC III, above note 12, para. 733.

69 *Ibid.*, para. 733; ICC, *Elements of Crimes*, 2002, Art. 8(2)(e)(vi)-6; see also Arts 7(1)(g)-6 and 8(2)(b)(xxii)-6.

70 ICRC Commentary on GC III, above note 12, para. 733.

71 Yūsuf Qaraḍāwī, *Islamic Law in the Modern World*, World Assembly of Muslim Youth, Wamyh House International for Printing, Riyadh, 2000, p. 26.

72 A. Al-Dawoody, above note 36, p. 174; A. Al-Dawoody, "International Terrorism and the Jurisdiction of Islamic Law", above note 47, pp. 573–575.

Historically, and as a part of the customary practice in pre-modern times, female captives in a conflict with an adversary from outside the caliphate were taken as slave wives or concubines. This ancient practice was regulated as a form of marriage in classical Islamic law in order to identify the fatherhood of children coming out of this relationship.⁷³ Today, however, it is absolutely prohibited under Islamic law.⁷⁴

Sexual violence is severely punishable depending on the nature and context of the violence as decided by the court. If a group of Muslims took up arms or threatened to use arms in the course of committing the crime of rape, they would be punished under the law of terrorism. Rashīd Riḍā (d. 1935) advocated that “rape or abduction for the purposes of obtaining a ransom”⁷⁵ must be treated under the Islamic law of terrorism. In fact, about eight centuries earlier, the Andalusian Mālikī judge Abu Bakr ibn al-‘Arabī (d. 1148) reportedly inflicted the punishment for terrorism on highway robbers who abducted a woman and raped her.⁷⁶

Corporal punishment

Under IHL applicable in NIAC, corporal punishment is prohibited under Article 4(2) of AP II and customary IHL.⁷⁷ IHL treaties do not provide a definition of corporal punishment, but in its ordinary meaning it can be defined as “physical punishment; punishment that is inflicted on the body”.⁷⁸

Under classical Islamic law, some permissible punishments for specific crimes entail severe physical pain and suffering and would amount to corporal punishment under international law. These punishments are practiced in a very small number of States and are permitted only if carried out after a sentence is passed by a judge and in accordance with Islamic law’s procedural safeguards and jurisdictional rules. They must not be imposed for any other reasons or in disregard of these procedures.⁷⁹

73 Kecia Ali, “Islam And Slavery”, Brandeis University, 2 February 2004, available at: www.brandeis.edu/projects/fse/muslim/slavery.html#islamic.

74 Egypt’s Dar Al-Ifta (fatwa institution), “Slavery Has No Place in Today’s Islam”, Fatwa No. 10759, 8 February 2016, available at: www.dar-alifta.org/en/fatwa/details/10759/slavery-has-no-place-in-todays-islam.

75 K. Abou El Fadl, above note 28, p. 337.

76 Muḥammad Abū Zahrah, *Al-‘Uqūbah*, Dār al-Fikr al-‘Arabī, Cairo, p. 139.

77 ICRC Customary Law Study, above note 12, Rule 91. Unlike Article 4(2) of AP II, common Article 3 does not contain an explicit prohibition against corporal punishment but prohibits cruel treatment. In addition, if it fulfils the requirements of mutilation or torture, corporal punishment could also be prohibited as such under common Article 3. See ICRC Commentary on GC III, above note 12, para. 631.

78 ICRC Commentary on GC III, above note 12, Art. 87, para. 3698, quoting the definition from Bryan A. Garner (ed.), *Black’s Law Dictionary*, 11th ed., Thomson Reuters, St Paul, MN, 2019, p. 1490.

79 See Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge University Press, New York, 2005.

Collective punishment

Under IHL applicable in NIAC, collective punishment is prohibited under Article 4(2) of AP II and customary IHL.⁸⁰ Collective punishment is defined as “[a] penalty inflicted on a group of persons without regard to individual responsibility for the conduct giving rise to the penalty”.⁸¹ The concept of collective punishment should be understood in its widest sense and applies not only to criminal sanctions (on the basis that no one may be convicted of an offence except on the basis of individual criminal responsibility) but also to “sanctions and harassment of any sort, administrative, by police action or otherwise”.⁸² Thus, it encompasses any disciplinary or other sanctions against a group of detainees without due regard to the responsibility of each punished individual.

Collective punishment is also prohibited under Islamic law.⁸³ The general principle, based on the Qur’an 6:164 and 53:38–39, is that every individual is responsible for their actions. In his commentary on the Qur’an 53:36–39, the Andalusian exegete-jurist Al-Qurṭubī (d. 1273) explained that the Prophet Abraham prohibited the practice of punishing an individual for the guilt of their relatives, such as a father, son or brother.⁸⁴ In the same vein, the Prophet Muhammad reaffirmed the principle of individual criminal responsibility under Islamic law as follows: “A man cannot be held responsible for the crime/wrongdoing of his brother or his father.”⁸⁵ Hence, any collective criminal or administrative sanction or disciplinary measure against individuals who are not responsible for the actions for which they are sanctioned is prohibited by Islamic law.

Mutilation and medical, scientific or biological experiments

Under IHL applicable in NIAC, mutilation and medical, scientific or biological experiments carried out on detainees are prohibited under common Article 3, Articles 4(2) and 5(2) of AP II and customary IHL.⁸⁶ Under these rules, the term “mutilation” refers to an act of physical violence that consists “in particular” of “permanently disfiguring the person or persons” or “permanently disabling or removing an organ or appendage”,⁸⁷ except if justified on “strict medical grounds, namely if it

80 ICRC Customary Law Study, above note 12, Rule 103.

81 ICRC Commentary on GC III, above note 12, Art. 87, para. 3689, citing B. A. Garner (ed.), above note 78, p. 331.

82 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols* ICRC, Geneva, 1987 (ICRC Commentary on the APs), para. 4536; ICRC Customary Law Study, above note 12, Rule 103.

83 Ahmed Zaki Yamani, “Humanitarian International Law in Islam: A General Outlook”, *Michigan Journal of International Law*, Vol. 7, No. 1, 1985, pp. 204–205.

84 Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *Al-Jāmi ‘li-Aḥkām al-Qur’ān*, ed. Aḥmad al-Bardūnī and Ibrāhīm Aṭfīsh, 2nd ed., Vol. 17, Dār al-Kutub al-Maṣriyyah, Cairo, 1964, p. 113.

85 Hadith 37187 in ‘Abd Allah ibn Muḥammad ibn Abī Shaybah, *Al-Kitāb al-Muṣannaḥ fī al-Aḥādīth wa al-Āthār*, ed. Kamāl Yūsuf al-Ḥūt, Vol. 7, Maktabah al-‘Ulūm wa al-Ḥukm, Medina, 1989, p. 456.

86 ICRC Customary Law Study, above note 12, Rule 92.

87 ICRC Commentary on GC III, above note 12, paras 638–639.

is conducive to improving the state of health of the person concerned” (this being the only exception – consent cannot justify an act of mutilation).⁸⁸ Medical or scientific experiments, or any other medical procedure not necessitated by the state of health of the person concerned and not consistent with generally accepted medical standards, are also prohibited.

Under Islamic law, mutilation of dead or living humans is strictly prohibited.⁸⁹ The general instructions that the Prophet Muhammad gave before military encounters included “Do not loot, do not be treacherous and do not mutilate.”⁹⁰ He enforced the prohibition of mutilation even against the mutilation of a rabid dog.⁹¹ Similarly, the first caliph Abū Bakr (d. 634) sent written instruction to his governor in Hadramaut, Yemen, which read: “Beware of mutilation, because it is a sin and a disgusting act.”⁹²

Medical, scientific or biological experiments not dictated by a competent medical authority as a necessary measure for the treatment of the patient are also prohibited. Likewise, any experiment that will harm or disfigure the patient is prohibited based on the Islamic legal guiding principles of protecting human dignity and the prohibition of causing harm.⁹³ These general principles apply in times of peace and in times of armed conflict, and regardless of the categories of conflict.

That being said, under Islamic law certain forms of corporal punishment are not considered mutilation if carried out in accordance with Islamic law. As noted above, however, such punishments may only be imposed for specific crimes and in accordance with clear judicial procedures.

Slavery and the slave trade in all their forms

Under IHL applicable in NIAC, slavery and the slave trade in all their forms are prohibited by Article 4(2) of AP II and customary IHL.⁹⁴ This rule also prohibits the enslavement of detainees. The phrase “slavery and the slave trade in all their forms” is found in Article 4(2)(f) of AP II and is taken from the 1926 Slavery Convention,⁹⁵ which defines the terms “slavery” and “slave trade” as follows:

⁸⁸ *Ibid.*, paras 643, 645.

⁸⁹ For a more detailed description, see A. Al-Dawoody, above note 9, pp. 1008–1010.

⁹⁰ Mālik ibn Anas, *Al-Muwattaʿa*, ed. Muḥammad Fūʿād ʿAbd al-Bāqī, Vol. 2, Dār Iḥyāʾ al-Turāth al-ʿArabī, Beirut, 1985, p. 448.

⁹¹ Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūt*, Dār al-Maʿrifah, Beirut, Vol. 9, pp. 135, 196, 131, Vol. 16, p. 145, and Vol. 26, p. 175.

⁹² ʿAbd al-ʿAzīz Ṣāqir, *ʿAl-ʿAlāqāt al-Dawliyyah fī al-Islām Waqt al-Ḥarb: Dirāsah lil-Qawāʿid al-Munazzimah li-Sayr al-Qitāl*, Mashrūʿ al-ʿAlāqāt al-Dawliyyah fī al-Islām No. 6, Al-Maʿhad al-ʿĀlami lil-Fikr al-Islāmī, Cairo, 1996, p. 57.

⁹³ Ali Jumʿah (former grand mufti of Egypt), Fatwa No. 750, 1 March 2005, available at: www.dar-alifta.org/fatwa/details/11838/.

⁹⁴ ICRC Customary Law Study, above note 12, Rule 94.

⁹⁵ ICRC Commentary on the APs, above note 82, Art. 4, para. 4541.

- Slavery is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.⁹⁶
- The slave trade “includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged[;] and, in general, every act of trade or transport in slaves”.⁹⁷

Under Islamic law, in inter-Muslim conflicts, captured enemy belligerents and their women and children must not be enslaved. In contrast, in armed conflict between the caliphate State and other States during the formative periods of Islamic law (the seventh to tenth centuries AD, the first four centuries of the Islamic era), the enslavement of captured enemy belligerents was a reality. Classical Muslim jurists dealt with such cases, and slavery in general, as a commonly practised phenomenon. While this means that slavery was not considered unlawful at the time (as in many other parts of the world), it does not mean that Muslim jurists initiated or encouraged slavery. On the contrary, Islamic law adopted a gradual approach to the elimination of slavery. For example, one of the eight categories of expenditures of *zakah* (compulsory alms giving, also spelled *zakat*) is the emancipation of slaves.⁹⁸ Also, emancipating slaves is an act of worship that Muslims are “strongly encouraged”⁹⁹ to do and one of the ways of atonement for sins.¹⁰⁰

The issue of slavery is an example of the risk of confusing Islamic law with Islamic history. In the modern world, all Muslim-majority States prohibit slavery. Article 11(a) of the Cairo Declaration on Human Rights in Islam, adopted by foreign ministers at the Organisation of the Islamic Conference (now the Organisation of Islamic Cooperation) on 5 August 1990, states that “[h]uman beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty”.¹⁰¹ The preamble of the Universal Islamic Declaration of Human Rights, adopted by the Islamic Council of Europe on 19 September 1981, states that “slavery and forced labour are abhorred”.¹⁰² Thus, it is clear that today Islamic law no longer condones or ignores slavery, either in peacetime or in armed conflict.

96 Slavery Convention, 25 September 1926 (entered into force 9 March 1927), Art. 1 (1).

97 *Ibid.*, Art. 1 (2); ICRC Commentary on the APs, above note 82, Art. 4, para. 4541. In addition, under the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour, are prohibited.

98 Qur'an 9:60.

99 Adnan A. Zulfiqar, “Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions”, *University of Pennsylvania Journal of Labor and Employment Law*, Vol. 9, No. 2, 2007, p. 432.

100 On the theory and practice of slavery throughout Islamic history and the arguments made by Muslims for the absolute abolition of slavery, see Jonathan A. C. Brown, *Slavery and Islam*, Oneworld Academic, London, 2020.

101 Cairo Declaration on Human Rights in Islam, UN Doc. A/CONF.157/PC/62/Add.18, 5 August 1990, Art. 11.

102 Universal Islamic Declaration of Human Rights, 19 September 1981, preambular para. (g)(iii).

Prohibition of uncompensated and abusive forced labour

Under IHL applicable in NIAC, uncompensated and abusive forced labour is expressly prohibited under Article 5(1) of AP II and customary IHL.¹⁰³ In the context of detainees held in relation to an armed conflict, IHL requires that if they are made to work, they must have working conditions and safeguards similar to those enjoyed by the local civilian population. As IHL prohibits uncompensated labour, detainees must be compensated if made to work. Moreover, as abusive forced labour is prohibited, it would not be lawful “to force detainees to carry out unhealthy, humiliating or dangerous work, bearing in mind the conditions in which the local population works”.¹⁰⁴

Islamic law adopts a clear and strict position on the compensation of labour, which may also apply to detainees. Workers must receive their payments as soon as possible once they finish their work. Unjustified delay in their payments is prohibited based on the Hadith of the Prophet Muhammad in which he instructs the Muslims to “give the worker his wage before his sweat dries”.¹⁰⁵ The second Muslim caliph ‘Umar ibn al-Khaṭṭāb (d. 644) preferred the payment of wages for workers on a daily basis.¹⁰⁶ The Mālikī jurist Ibn Saḥnūn (d. 870) argues that the payment of wages for workers takes priority over the payment of one’s debts.¹⁰⁷ This means that uncompensated labour is an act of injustice and is prohibited.

Pillage

Under IHL applicable in NIAC, pillage is prohibited under Article 4(2) of AP II and customary IHL.¹⁰⁸ The term “pillage” is understood as the taking of the personal belongings of people, including detainees, for personal use by their captors.¹⁰⁹ This means that while it is, for instance, permitted for a capturing power to take a detainee’s weapon and military equipment and to use these for their conflict-related purposes, it is prohibited for a guard to take any of the detainee’s personal belongings (for instance, a watch or a personal phone) and use them for private purposes. The prohibition against pillage reflects, in essence, the common prohibition against stealing.

Under Islamic law, *ghulūl* (looting) is a punishable crime. It is defined as the taking or stealing of an item from the war booty before the booty is divided up, or allocating a part of the war booty to oneself without handing it over to be distributed

103 ICRC Customary Law Study, above note 12, Rule 95.

104 ICRC Commentary on the APs, above note 82, Art. 5, para. 4579.

105 Muḥammad ibn Muḥammad ibn ‘Abd al-Raḥman al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl*, 3rd ed., Vol. 5, Dār al-Fikr, Beirut, 1992, p. 395.

106 A. A. Zulfīqar, above note 99, p. 436.

107 Aḥmad ibn Idrīs al-Qarāfi, *Al-Dhakīrah*, ed. Muḥammad Būkhūbah, Vol. 8, Dār al-Gharb al-Islāmī, Beirut, 1994, p. 190.

108 ICRC Customary Law Study, above note 12, Rule 52. Specifically with respect to detainees, see Rule 122.

109 *Ibid.*

by the army chief.¹¹⁰ This means that in a conflict with an adversary from outside the caliphate, the taking of moveable property before it is distributed as war booty by those in command – as was the customary practice in pre-modern times – is prohibited.

In the case of inter-Muslim fighting, classical Muslim jurists agree that it is prohibited for governmental forces to use weapons confiscated from rebels, except in cases of dire military necessity. However, “these weapons and any other property confiscated from [the rebels] during the war must be returned to them after the cessation of hostilities”.¹¹¹ Thus, as Islamic law only condones the confiscating of detainees’ property and requires the property to be returned upon release, it cannot be seen as permitting pillage in inter-Muslim fighting.

The use of detainees as “human shields”

Under IHL applicable in NIAC, the use of human shields is prohibited.¹¹² In the detention context, the use of human shields is understood as an intentional co-location of detainees close to military objectives with the specific intent of trying to prevent the targeting of those military objectives.¹¹³ Concretely, it would be prohibited to hold detainees in the operational command headquarters of a party to the armed conflict or to place military equipment in a place of detention if the intent is to thereby shield the headquarters or the equipment against attack.

Classical Muslim jurists did not address the question of the use of human shields by Muslim arms carriers, but it appears inconceivable that such conduct would be permitted in the classical Islamic law books in light of the principle of protection of civilians and the obligation to treat detainees humanely during their captivity. However, the jurists did address the use of human shields (*al-tatarrus*) by enemies. They discussed the permissibility of responding to an enemy’s attacks carried out from behind human shields in two cases: (a) where the human shields are the non-Muslim enemy’s own women and children (i.e., civilians) or (b) where the human shields are Muslim detainees, civilian Muslims or *ahl al-dhimmah* (permanent non-Muslim citizens of the Islamic State). In brief, “the jurists permit shooting at the human shields in these two cases if required by military necessity, provided that Muslims aim to direct their attack at the combatants and avoid hitting non-combatants as far as possible”.¹¹⁴

110 A. Al-Dawoody, above note 9, p. 1008.

111 A. Al-Dawoody, above note 36, p. 164.

112 ICRC Customary Law Study, above note 12, Rule 97. More, the use of human shields will also violate rules of IHL pertaining to the conduct of hostilities, notably the principle of distinction and the obligation to take feasible precautions to separate civilians from military objectives.

113 ICRC Customary Law Study, above note 12, Rule 97.

114 Najib al-Armanāzī, *Al-Shar’ al-Dawli fī al-Islām*, 2nd ed., Riad El-Rayyes Books, London, 1990 (first published 1930), p. 124: ‘Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sultāniyyah*

The obligation to provide humane conditions of detention

During armed conflict, the detaining authority is responsible for providing humane conditions of detention so as to maintain detainees in good health, protect their lives, and respect their physical and mental integrity. Providing detainees with humane living conditions is not only essential for their physical and mental integrity but may also help the detaining authority to avoid harm to detainees, anxiety and turmoil among detainees, and the development of additional needs. The needs of detainees can vary according to age, sex, health, disability, culture, religion or similar factors.

The provision of adequate food, water, clothing, shelter and medical attention and safe places of detention removed from the combat zone

Under IHL applicable in NIAC, common Article 3 requires in broad terms that detainees must be treated humanely¹¹⁵ and that all wounded and sick persons, including detainees, “must be cared for”. AP II and customary IHL demand in more detail that detainees “must be provided with adequate food, water, clothing, shelter and medical attention” and that they be “held in premises which are removed from the combat zone and which safeguard their health and hygiene”.¹¹⁶ Under AP II, food, water, clothing, shelter and medical attention must be provided “to the same extent” as for the civilian population.¹¹⁷

Under Islamic law, providing detainees with humane conditions of detention stems from the requirement to observe “good treatment towards the prisoners”. In the Battle of Badr, the Prophet Muhammad ordered detainees to be held in the mosque and in the homes of the Companions of the Prophet in order to protect them against the heat and suffering. One of the detainees, who was undressed, was provided with clothing,¹¹⁸ and this has subsequently been understood as a requirement to provide detainees with clothing. There are also many sources citing that detainees must be fed and provided with water. This treatment of detainees is described in the Qur’an as follows: “And they feed the needy, the orphans and the captives [with their own] food, despite their love for it [which can also be interpreted as ‘because of their love for God’]”.¹¹⁹

wa al-Wilāyāt al-Dīniyyah, ed. Aḥmad Mubārak al-Baghdādī, Maktabah Dār ibn Qutaybah, Kuwait, 1989, p. 57; Muḥammad ibn Aḥmad al-Anṣārī al-Qurtubī, *Al-Jāmi‘ li-Aḥkām al-Qur’ān*, Vol. 16, Dār al-Sha‘b, Cairo, pp. 287 ff.; A. Al-Dawoody, above note 9, p. 1006; A. Al-Dawoody, above note 36, pp. 116–118.

115 In the practice of several States, elements of “humane treatment” include “treatment with all due regard to the person’s sex, respect for convictions and religious practices, provision of adequate food and drinking water as well as clothing, safeguards for health and hygiene, provision of suitable medical care, an entitlement to sleep, protection from violence and against the dangers of the armed conflict, and appropriate contacts with the outside world”. ICRC Commentary on GC III, Art. 3, para. 592.

116 ICRC Customary Law Study, above note 12, Rules 118, 121. Articles 5(1)(a)–(b) and (2)(c)–(d) of AP II provide further detail, in particular on medical treatment and on the evacuation of detainees if their place of detention becomes exposed to hostilities.

117 AP II, Art. 5(1)(b)–(d).

118 Muḥammad ibn Ismā‘īl al-Bukhārī, *Mukhtaṣar Ṣaḥīḥ al-Imām al-Bukhārī*, ed. Muḥammad Nāsir al-Albānī, Vol. 2, Maktabah al-Ma‘ārif, Riyadh, 2002, p. 318.

119 Qur’an 76:8.

Regarding medical care, under Islamic law detainees shall be provided with any necessary medical treatment that is available. In the tenth century, the Abbasid (good vizier) ‘Alī ibn ‘Isā ibn Dāwūd ibn al-Jarrāḥ (d. 946) was concerned about the inhumane conditions in some prisons. He wrote to Sinān ibn Thābit ibn Qurrah (d. 943), the personal physician of two Abbasid caliphs, instructing him to appoint medical professionals to visit the prisoners daily and provide the needed medical care for them.¹²⁰ Failing to provide available medical treatment for detainees in the context of armed conflict is a violation of the obligation of “good treatment” of detainees.

Protection of women, children, and vulnerable detainees

Under customary IHL applicable in NIAC, several categories of persons are entitled to specific protection, including in situations of detention. IHL sets out that “[t]he elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection”.¹²¹ Regarding women, the law requires that “[w]omen who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women”.¹²² When it comes to children, IHL demands generally that “[c]hildren affected by armed conflict are entitled to special respect and protection”,¹²³ and specially that “[c]hildren who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units”.¹²⁴

These rules reflect the fact that detained women will have different needs from men, children will need special protection, and the needs of older persons or persons with disabilities will have to be provided for. Providing for these specific needs is essential to ensuring humane conditions of detention for all detainees without adverse distinction.

Islamic law provides rules that ensure the protection and humane treatment of specific categories of detainees. For instance, women should not be separated from their children, and their dignity and specific needs must be preserved. There are also a number of Islamic law provisions that ensure the special protection of children, such as those that prohibit their recruitment into armed forces, grant them access to education and enable them to maintain unity with their families. Classical Muslim jurists “prohibited the separation of children from their parents, grandparents or siblings, and some also prohibited their separation from other members of the extended family.”¹²⁵

120 ‘Alī ibn Yūsuf Ibn al-Qiftī, *Ibn Al-Qiftī’s Ta’rikh al-Ḥukamā’*, ed. Julius Lippert, Dieterich’sche Verlagsbuchhandlung, Leipzig, 1903, p. 193.

121 ICRC Customary Law Study, above note 12, Rule 138.

122 *Ibid.*, Rule 119.

123 *Ibid.*, Rule 135. Additional detail on the protection of children in armed conflict is found, where applicable, in Article 4(3) of AP II.

124 ICRC Customary Law Study, above note 12, Rule 120.

125 Ahmed Al-Dawoody and Vanessa Murphy, “International Humanitarian Law, Islamic Law and the Protection of Children in Armed Conflict”, *International Review of the Red Cross*, Vol. 101, No. 911, 2019, p. 571.

The special protection of persons with disabilities is likewise an important issue that requires further attention from modern Islamic jurists.¹²⁶ Classical Islamic law provides rules on the protection of persons with disabilities during military operations, and their specific needs during detention must be fulfilled;¹²⁷ failure to do so may be contrary to the obligation to provide humane treatment for all detainees. It may also endanger the lives of persons with disabilities, which is a flagrant violation of the protection of life (*hifz al-nafs*), the first of the five ultimate objectives of Islamic law (namely life, religion, intellect, lineage and property).¹²⁸

Registration of personal details

Under IHL applicable in NIAC, all parties to a conflict have the obligation to record the “personal details of persons deprived of their liberty”.¹²⁹ Registering sufficient personal details to clearly identify a detainee (such as the detainee’s name, date and place of birth, date of capture, and rank and number in a State’s armed forces, as well as any previous places of detention) is essential for several reasons. It informs the detaining authorities of how many detainees are in its power and allows for adequate planning, regarding both logistics and guarding staff. It also allows the detaining authorities and other concerned parties to keep track of detainees, prevents ill-treatment or disappearances, allows tracing of those reported missing and enables family notifications and family visits.

Islamic law developed in the context of the Arabian tribal culture in the seventh century, where the soldiers in the earliest battles in Islamic history mostly knew the full names of their enemy combatants and prisoners. Obviously there were no modern or sophisticated methods of recording the details of detainees, yet there is a remarkable documentation of the lists of war fatalities and detainees in the early Islamic battles, mainly between 624 and 632 AD.¹³⁰ Registering the details of detainees can in some cases serve the Islamic ultimate objective of the protection of life and dignity of detainees and can help to prevent the forms of ill-treatment discussed above.

Contact with the outside world (correspondence and visits)

In NIAC, AP II and customary IHL demand that “[p]ersons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions

126 Ahmed Al-Dawoody and William I. Pons, “Protection of Persons with Disabilities in Armed Conflict under International Humanitarian Law and Islamic Law”, *International Review of the Red Cross*, Vol. 105, No. 922, 2022, p. 356.

127 *Ibid.*, pp. 352–374.

128 On the ultimate objectives of Islamic law, see, for example, Felicitas Opwis, “Maqāṣid al-shari’ah”, in Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (eds), *Routledge Handbook of Islamic Law*, Routledge, London, New York, 2019. For some Islamic scholars, the protection of life comes second after the protection of religion.

129 ICRC Customary Law Study, above note 12, Rule 123.

130 Ahmed Al-Dawoody, “Management of the Dead from the Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics”, *International Review of the Red Cross*, Vol. 99, No. 905, 2017, p. 762.

relating to frequency and the need for censorship by the authorities”, and that detainees “must be allowed to receive visitors, especially near relatives, to the degree practicable”.¹³¹ Regular and meaningful contact with the outside world is essential to ensuring the mental well-being of detainees and their families. Such contact can take the form of family visits, letters, calls, video calls, electronic messages, or messages submitted through the ICRC. Allowing and facilitating detainees’ contact with their families avoids anguish and unnecessary suffering, both of families and of detainees. In practice, allowing family contact will often facilitate the better management of a place of detention and help reduce tensions and violence by and among detainees.

Under Islamic law, it is prohibited to cause any physical or psychological harm to detainees, such as by preventing them from receiving family visits.¹³² Classical Muslim jurists disagreed on allowing detainees to leave prison facilities to attend funerals of their near relatives, and on permission to visit their families in cases of serious illness.¹³³ They also disagreed on allowing conjugal prison visits during which it is allowed for detainees to have sex with their spouse.¹³⁴ They allowed Muslim detainees to have sex with their wives in detention facilities controlled by their captors if they are certain that their captors will not rape their wives.¹³⁵ While not explicit on an obligation of Detaining Powers to allow family correspondence or visits, these pre-modern Islamic sources support permitting detainees to correspond with their families and to receive family visits.

Respect for personal convictions and religious practices

Under IHL applicable in NIAC, parties to the conflict have the obligation to respect “the personal convictions and religious practices” of all detainees.¹³⁶ Where applicable, AP II further requires that detainees “be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions”.¹³⁷ For detainees’ mental well-being, respect for personal or religious beliefs (irrespective of the religion) and allowing them to perform religious duties is important, if possible with the assistance of religious personnel and books.

Under Islamic law, in cases of *bughāh*, detainees are mainly Muslims, and observing and respecting Islamic religious practices is an Islamic obligation. In

131 ICRC Customary Law Study, above note 12, Rules 125–126. Where applicable, Article 5(2)(b) of AP II requires that “within the limits of their capabilities”, detaining authorities respect the following provision: detainees “shall be allowed to send and receive letters and cards, the number of which may be limited by [the] competent authority if it deems necessary”.

132 Ḥasan Abū Ghuddah, *Aḥkām al-Sijṇ wa Mu’āmalah al-Sujanā fī al-Islām*, Maktabah al-Manār, Kuwait, 1987, p. 369.

133 *Ibid.*, pp. 413–414.

134 *Ibid.*, pp. 457–460.

135 *Ibid.*, p. 461.

136 ICRC Customary Law Study, above note 12, Rule 127.

137 AP II, Art. 5(2)(a).

addition, Qur'an 2:256 and 10:99 prohibit religious compulsion and thereby protect the right of non-Muslims, including detainees, to practice their religion freely in Islamic territories.¹³⁸

The treatment of deceased detainees

There are several rules under IHL applicable in NIAC that address the treatment of the dead, including deceased detainees. Under customary IHL, “[p]arties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.” Moreover, the dead must be “disposed of in a respectful manner and their graves respected and properly maintained”. In addition, “[w]ith a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves”.¹³⁹ These rules have to be complied with irrespective of the reason for which a detainee dies.

Under Islamic law, burying the dead is a *farḍ kifāyah* (collective obligation) on all Muslims.¹⁴⁰ Respect for human dignity requires that dead enemy soldiers, including deceased detainees, must be given proper burials, or their bodies must be handed over to the adversary or to the deceased's family. This is to protect the dead from decomposing or being eaten by wild animals, which would be regarded as tantamount to mutilation. Families must be permitted to visit their relatives' graves. Early Islamic sources describe a long-standing practice among warring parties of accounting for and repatriation of the dead.¹⁴¹

Deceased Muslim detainees must therefore be buried in accordance with Islamic burial rules and their personal effects must be returned to their families as their property cannot be taken as spoils of war. Respect for the dead also includes respect for their graves: deceased non-Muslim detainees must be buried in a dignified manner, as again, to do otherwise would be tantamount to mutilation under Islamic law.¹⁴² The tradition of the Prophet Muhammad and the deliberations of the classical Muslim jurists have laid out the etiquette for visiting graves and

138 Article 10 of the Cairo Declaration on Human Rights in Islam, above note 101, states: “It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.” See Ahmed Al-Dawoody, “From Tripartite Division to Universal Humanism: Alternative Islamic Global International Relations”, in Deina Abdelkader, Raffaele Mauriello and Nassef Manabilang Adiong (eds), *Islam's Contributions to IR Theory and Practice: Islamic Approaches to International Affairs*, Palgrave Macmillan, London, 2016, p. 115.

139 ICRC Customary Law Study, above note 12, Rules 114–116. Some of these obligations are also found in Article 8 of AP II. For more information, see Helen Obregón Gieseken and Ximena Londoño, “Dignity in Death: International Humanitarian Law and the Protection of the Deceased in War”, *International Review of the Red Cross*, Vol. 107, No. 929, 2025.

140 A. Al-Dawoody, above note 130, p. 764.

141 *Ibid.*, pp. 762, 766; Wahbah al-Zuhayli, *Mawsū'ah al-Fiqh al-Islāmī wa al-Qaḍāyā al-Mu'āṣirah*, Vol. 7, Dār al-Fikr, Damascus, 2010, pp. 493–496.

142 A. Al-Dawoody, above note 130, p. 768.

have delineated acts that are considered disrespectful or prohibited when visiting gravesites.¹⁴³

Conclusion

Long before rules on the protection of detainees were codified in IHL, Islamic law provided elementary protections for soldiers – and even rebels – captured in the context of an armed conflict. These rules were first articulated in the forms of orders by the Prophet Muhammad for fighting between the nascent caliphate State and non-Muslim adversaries, but they are considered to apply *a fortiori* to armed conflicts within the caliphate State and have been complemented by additional rules.

As seen in this article, IHL and Islamic law share several basic rules on the protection of detainees during armed conflict. The most fundamental one is the obligation to treat detainees humanely, which is one of the leitmotifs of the Geneva Conventions and a cornerstone of Islamic law, expressed in the Prophet Muhammad's order to "[o]bserve good treatment towards the prisoners". From this derives, *inter alia*, the prohibition against torture and other forms of inhumane or cruel treatment or punishment as well as the obligation to provide detainees with adequate food, water, medical care, shelter and clothing, as well as several other safeguards. These rules are well established in each body of law, and for detainees in the hands of parties to armed conflicts that follow Islamic law rather than IHL, it is essential that their captors know and apply them.

This being said, Muslim belligerents should also be aware of those issues for which a permissive interpretation of Islamic law diverges from today's universally agreed rules of IHL, and in which cases such differences may lead to violations of the latter that constitute war crimes. Likewise, if humanitarians and other actors aim to engage Muslim belligerents based on Islamic law in order to protect detainees in accordance with the contemporary internationally agreed standards, they too must know where the two bodies of law converge, and where they differ.

Without providing a rule-by-rule analysis, a few key differences stand out. The first issue concerns the lawful options of a party to the conflict to determine the "fate" of a prisoner. Islamic law provides the Muslim ruler with certain powers. In conflicts between the caliphate State and an adversary from outside the caliphate, some classical Muslim jurists argue that the Muslim ruler may decide the fate of the detainee according to what best serves the interests of Muslims: setting prisoners free, executing some or all of them, enslaving them, or exchanging them for Muslim prisoners or for money. Some of these options would be clear IHL violations and international crimes, amounting to murder, enslavement or hostage-taking. It must be borne in mind, however, that these options are only available in certain types of conflicts, and it is disputed whether this is the correct interpretation of Islamic law. Other classical Islamic law jurists belonging to the same period argue that detainees

143 W. al-Zuhayli, above note 141, pp. 463–465.

must be set free graciously or exchanged for Muslim prisoners. As explained above, it is worth reiterating that “today Islamic law should be interpreted as outlawing the killing of POWs” and any other violations of treaties that Muslim-majority States have ratified.¹⁴⁴

The second issue relates to the protection of detainees against torture and physical punishment. Both are absolutely prohibited under IHL, and Islamic law also contains clear prohibitions against torture: as previously noted, the Prophet Muhammad said unambiguously that “God will torture [in the Afterlife] those who torture people in this life”.¹⁴⁵ Some Muslim jurists argued, however, that torture can be permitted in relation to certain “notorious criminals”, though they were addressing non-armed conflict situations. Moreover, under both IHL and Islamic law, reciprocity cannot be used as a legal justification for torture or other violations of the respective body of law. While the infliction of certain corporal punishments is well known in Islamic law, these reflect a practice of only a very small number of Muslim-majority States and certain NSAGs, and require the observance of strict rules and procedures. In any case, parties to armed conflict that follow Islamic law rules must be aware that such conduct is not permissible under IHL and may be prosecuted as a war crime.

The third issue to keep in mind relates to the times in which IHL and Islamic law rules on the protection of detainees developed. The formative periods of Islamic law were the first four centuries of the Islamic era, the seventh to tenth centuries AD. At that time, slavery was widely practiced in many parts of the world. It may therefore not be surprising that medieval Muslim jurists dealt with the issue as more of a social phenomenon and not as a legal issue that Islamic law initiated or intended to maintain. Today, however, all Muslim-majority States prohibit slavery – just as international (humanitarian) law does.

The fourth issue worth highlighting is that IHL provides more detailed rules than the Islamic laws of war on several aspects of the protection of detainees: for instance, customary IHL provides specific rules on the prohibition of sexual violence and of enforced disappearance, and on the obligation to allow and facilitate family contact. Today these rules are legally binding on all parties to armed conflict. While it is not possible to find explicit equivalents in Islamic law, related protection standards can be identified when a learned Muslim jurist analyses Islamic law comprehensively, in particular the cornerstone obligation to observe good treatment towards prisoners. Even under IHL, some of the more detailed rules on the treatment of detainees are not spelled out in treaty law; instead, in NIAC some may only derive from customary IHL, which reflects the recent practice and *opinio juris* of States.

To conclude, scholars of IHL and Islamic law need to understand that while the two bodies of law share important principles on the protection of detainees during armed conflict, they also differ. It is essential to be aware that complying with Islamic law cannot be a valid justification for violating IHL. In other words,

¹⁴⁴ A. Al-Dawoody, above note 49.

¹⁴⁵ Hadith 2613 in M. I. al-Ḥajjāj al-Qushayrī, above note 55, p. 2018.

international (criminal) law does not know a defence of having followed national, religious or any other law.

At the same time, revisiting and deliberating classical Islamic law rules with Islamic scholars and Islamic weapons bearers who abide solely by Islamic law can be important in the effort to ensure humane treatment for detainees. As shown in this article, a modern interpretation of Islamic law shows significant convergence between the protection of detainees under Islamic law and under IHL. Where the two bodies of law converge, engaging Muslim weapons bearers on respect for Islamic law can also strengthen their compliance with IHL. To quote the ICRC's 2024 report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*:

IHL is the legal framework binding all parties to armed conflicts. That being so, to effectively communicate and anchor the protection owed to people affected by armed conflict during their dialogue with armed forces and non-state armed groups, humanitarian organizations can also draw on norms, ethics, and standards from cultural traditions and practices, as well as other legal frameworks such as Islamic law, when there are points of correspondence with IHL.¹⁴⁶

¹⁴⁶ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today's and Future Conflicts*, Geneva, 2024, p. 77, available at: <https://shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-building-a-culture-of-compliance-for-ihl-to-protect-humanity-in-today-s-and-future-conflicts-pdf-en.html>.