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Humanitarian International Law in Islam: A General Outlook

Ahmed Zaki Yamani*

I. HUMANITARIAN LAW AND HUMANISTIC LAW

Needless to say, any monograph on humanitarian international law in Islam is perforce lengthy, because divine law is beyond the grasp of the human endeavor. All I can promise is to try to cover as much ground as possible rather than fight shy of exposing my inadequacy—the principle being “If you cannot take it all, don’t leave it all.” What then do we mean by humanitarian international law?

Authors of international law books use two different terms, namely, “humanitarian law” and “the rights of man.” To me, the rights of man refer to humanistic law. Humanitarian law is derived from humanity or humanitarianism, while humanistic law is a derivative of man or humanism. Authors attribute to these two terms different meanings.

I personally prefer that each term should have a separate meaning: humanitarian law in this review shall mean the law which has as its object the rights of man in time of war and during armed conflict, while humanistic law shall mean the law that regulates the rights of man in time of peace.

Some people may feel uneasy when I speak of humanitarian international law in Islam. For how can we identify a branch of Islamic international law and specifically call it “humanitarian” when we know that all Islamic law is a humanitarian law and that Islam’s name itself is derived from the Arabic word “peace.” I was beset by that same feeling, but I set it aside as rooted in non-essential considerations. Indeed I intend to study a term used in contemporary language and given a restricted meaning; and the truth is that although peace is the spirit of Islam, yet peace is not the only truth in the human community which also knows competition and internecine fighting in a savage way.

The tolerant religion of Islam was largely responsible for moving humanity

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from the darkness of Greco-Roman ideas about war to the light in which the enemy was guaranteed certain rights and the fighting man was assured of certain protections. This move was great in relation to the ferocity of war as it was known to the Greeks and the Romans, and is still great in relation to that which we are witnessing today despite the efforts, exerted over four centuries, of contemporary international law to curb the horrors of war and alleviate its woes.

A Word of Truth

Islamic *Shari'ah*¹ has established guideposts for the Islamic state to follow in its international relations, and has set the lines of its behavior towards other states. The Holy *Qurān* contains numerous verses in this connection, from which I quote the following as an example: "Who, if we establish them in the land, will observe the Prayer, and pay the *Zakāt*, urge to what is reputable and restrain from what is disreputable—to Allah belongs the issue of affairs." [22(42)]²

War in Islam has one of two goals: protection of the land of Muslims against invasion; or consolidation of the Islamic religion lest it should be wiped out. This is why war pursues virtue, establishes justice, and honors the individual. The *Qurān* points out the purpose of war when it says, "Fight them until there is no dissension and the religion is entirely Allah's." [2(193)]

Philosophy of Humanitarian International Law: the Islamic Concept

Under the conditions mentioned above, what is the role of humanitarian international law? Humanitarian international law must reconcile two contradictory issues: humanitarian considerations and the requirements of necessity. Humanitarian considerations urge amity and compassion, while necessity pushes for force and competition. The Prophet summed up this role of humanitarian international law in Islam when he said, "I am the Prophet of gentle compassion; I am the Prophet of fierce battle."³ He combined compassion and battle, placing compassion before battle in order to impress upon the Muslim fighter that he is the hand of justice, and not the sword of depravity. As regards the term "fierce

1. *Shari'ah* literally means the path that the believer must tread. As a religious and legal term it means the totality of God's commandments or the canon law of Islam. See generally *ENCYCLOPEDIA OF ISLAM* (M. Houtsma, T. Arnold, R. Basset & R. Hartmann 1st ed. 1913).

The background notes in this article were added by the editors for the convenience of those readers unfamiliar with Islam. Unless otherwise noted, they are based on the appropriate listing in the first edition of the *ENCYCLOPEDIA OF ISLAM*—eds.

2. All citations to the *Qurān* refer to the standard Arabic chapter and verse numberings. For further reference, English speaking readers may wish to look to *KORAN* (N. Dawood trans. 1956) or *THE MEANING OF THE GLORIOUS KORAN* (M. Pickthall trans. 1956), two of the best known English translations of the *Qurān*.

3. The sayings or traditions of the Prophet Muhammad discussed in this article are not specifically cited herein. These traditions were compiled by various Muslim jurists and make up many volumes of reference material. For information regarding the role of these traditions in Islamic law, see M. Coulson, *A HISTORY OF ISLAMIC LAW* 41–43, 62–65 (1964).

battle," although it means a "bloody fight" and a "slaughter," it also connotes the fighting of sedition rather than mere combat. The Arabic word for "fierce battle" also implies "repair," "reform," or "adjustment;" these are the objects of fighting in Islam and are a control on the behavior of Muslim fighters. It is in these sublime meanings that "compassion" and "fierce battle" meet.

Swiss jurist Jean Pictet attempted to summarize the philosophy of humanitarian international law in an encompassing sentence. The best he could come up with was the principle "Do to others what you would have done to yourself."⁴ We know that the noble Prophet said, "One will not be a believer unless one wishes for one's brother what one wishes for oneself." This means that adherence to the philosophy of humanitarian international law is, in Islam, a branch of the faith, and, after the five basic elements of Islam, is itself a basic pillar.

It was the culture of Islam which was the first to innovate the rules that constitute humanitarian international law. Some of these rules were carried back by returning crusaders and some were studied in Italian and Spanish universities from which the fathers of modern international law emerged. Although modern humanitarian international law, the law that governs the rights of man during times of war, has been recorded in written documents, largely as a result of the efforts of the Swiss humanist Henri Dunant,⁵ its principles cannot be divorced from their customary origins. This fact was recorded in the preamble to the Second Protocol supplementing the Geneva Conventions. It expressly states that whatever is not governed by the written rules is indeed governed by the rules of international custom, and protected by the principles of humanity and the dictates of the common conscience.⁶ The role of Islamic *Shari'a* in establishing those customs is well known; its merits are without limits and its injunction to adhere to the directives of conscience is a principle without limitation.

It is true that the rules of humanitarian international law are instinctive, but in Islam instinct is commanded by God who formulates its requirements in the *Qur'an*, his Holy Book, and in the traditions of Muhammad, his gentle Prophet, as a duty of mankind and an obligation decreed for enforcement and respect. "He has formed people by nature to follow, there is no alteration of the creation of Allah. That is the right religion, but most of the people do not know." [30(30)]

4. Pictet, *The Principles of International Humanitarian Law*, 1966 INT'L REV. RED CROSS 455, 462.

5. Henri Dunant (1828-1910), a banker from Geneva and the founder of the International Red Cross, was a leading force behind the conclusion of the Geneva Convention for the Amelioration of Conditions of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377, 1 Bevans 7.

For a convenient collection of conventions and international agreements on international humanitarian law, see INT'L COMM. OF THE RED CROSS, *INTERNATIONAL RED CROSS HANDBOOK* (12th ed. 1983).

6. Protocol Relating to Protection of Victims of Non-International Conflicts, June 8, 1977, preamble, U.N. Doc. A/32/144 Annex 2 (1977) [hereinafter cited as Protocol II].

Assuming that necessity is the human limitation affecting the principle of "wishing good for others," Islamic *Shari'a* has taken a stance which is not taken in the West. It urges the Muslim to be altruistic even in case of necessity, and makes altruism a desirable quality of the faithful: "But preferring (them) over themselves even though there was want amongst them." [59(9)] Even if a Muslim wishes to invoke necessity, his right to do so is qualified and limited by the Holy *Qurān* which says, "But if anyone is compelled, without oppression or deliberate transgression, no guilt rests upon him." [2(173)] [6(145)] [16(115)] The *Qurān* ensures that a Muslim's action in cases of necessity is not left to his whim, for he is required to act without oppression and without deliberate transgression.

II. GENERAL CONCEPTS OF HUMANITARIAN INTERNATIONAL LAW IN ISLAM: ARMED CONFLICT OF A NON-INTERNATIONAL NATURE AND ARMED CONFLICT OF AN INTERNATIONAL NATURE

Moving from this introduction to a direct discourse, I think it is best to follow the method of the Swiss jurist, Jean Pictet. Hence, I will first deal with the general principles of humanitarian international law in Islam in the light of presently established international humanitarian principles in positive law. Armed conflict—or fighting—in the established Islamic nations is divided into two general categories: conflicts referred to by Al-Mawardi⁷ as "wars of public interest" and wars against polytheists and apostates.

A. Wars of Public Interest

By way of clarification, I would like to say a few words about the various types of wars of public interest.⁸

1. Fighting Belligerents and Highway Robbers

Belligerents and highway robbers are corrupt individuals grouping themselves to raise arms and commit highway robbery, taking property and life and hindering travel. Obviously, we are here dealing with a kind of fighting which falls within humanistic law, the law that regulates the rights of man in times of peace, rather than humanitarian international law, which regulates the rights of man during times of war. Therefore, the rules pertaining to the former represent a penal legislation to be applied by the state within its territory to the inhabitants of such territory by virtue of state sovereignty. The stern penalty prescribed by the

7. Al-Mawardi (d. 450 H/1058 A.D.) was a leading *Shafi'i* jurist who often taught in Basra and Baghdad. The dates of death given in this and subsequent notes are from the Islamic calendar.

8. The author in this section draws on the works of Al-Mawardi and Abu Ya'li and those who agreed with these two jurists.

Noble Verse is attributable to the ugliness of the crime and to the fact that it threatens the security of the community.

2. *Fighting Rebels and Dissident Kharijites*

Rebels and dissident Kharijites⁹ are Muslims who rebel against the *Imām* (ruler), differ with the community, and adopt a reprehensible, innovated school of thought—*Mazhab*. In Islamic history dissident Kharijites differed with ‘Ali ibn Abu Talib and rebelled against him when he agreed to arbitration with Mo‘awiyah; they settled in a place called Harura and were therefore known as the Haruriyah. Their leaders were ‘Abd Allah ibn al-Kawwa al-Yashkari and Shabat at-Tamini. A group of these dissidents interrupted ‘Ali while he was delivering a sermon from his pulpit with shouts of “The only Arbiter is God.” To which ‘Ali answered: “A word of truth intended to cover up a falsehood. We owe you three things: We shall not bar you from the mosques of God where you will invoke the name of God; We shall not take the initiative of fighting with you; We shall withhold booty from you as long as your hands are with us.”

If these rebels should show their dissent while they are mingled with the loyal Muslims the rule is that the *Imām* should clarify to them the unsoundness of their belief and the invalidity of their innovation so that they return to the true creed and agree with the community. The *Imām* may impose punishment upon those who show overt corruption in order to discipline them or deter others from following them, but this punishment should not reach execution or the infliction of a *Hadd* (one of the penalties prescribed in the *Qurān* for certain capital crimes). The position toward dissidents is similar to that toward opposition parties. Their freedom to express their opinions is guaranteed so long as their opposition is not accompanied by acts of violence or supported by force. If they do either, the *Imām* shall have the right to punish them with a *Ta’zīr* (a discretionary penalty below a *Hadd*). This case has nothing to do with humanitarian international law.

As a matter of fact, disobedience of the *Imām*, whether the disobedient group aggregates under a leader or not, is a kind of civil war which requires fighting the rebels voluntarily. The Holy *Qurān* says in this connection: “If two parties of the believers fight, set things right between them, and if one of the two parties oppresses the other, fight the one which is oppressive until it returns to the affairs of Allah, then if it returns, set things right between them justly and act fairly; verily Allah loves those who act fairly.” [49(9)] Oppression here may include transgression in combat or turning away from peace.

Fighting against rebels and Kharijites corresponds to the fighting referred to in article 3 of all the Geneva Conventions.

9. See generally I. GOLDZIEHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 170–74 (A. Hamori & R. Hamori trans. 1981).

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

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

To this end, the following acts are and shall remain prohibited at any time or in any place whatsoever with respect to the above-mentioned persons:

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

2. The wounded and the sick shall be collected and cared for. . . .¹⁰

Exclusive attention was given to this category of fighting by the second of the two protocols that came out of the 1976 General Conference for the Development of Humanitarian Law.¹¹ This protocol, however, was beset with so many stumbling blocks that one can safely say that it was almost stillborn. Like the article quoted above, this protocol's basic guarantees are restricted to those who do not play a positive role in the acts of aggression, including the wounded, the sick, and prisoners. To these people it offers guarantees which do not go beyond those granted by the previously quoted article. In connection with the ways and methods of war, the protocol adds provisions which prohibit vengeance and treachery and do not allow that the living be deprived of the right to seek refuge. It also establishes principles for the protection for civilians and children. These protections and these guarantees are but a part of the provisions extended to those involved in armed conflict having an international nature, as I shall explain in part B of this section.

10. *E.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3115, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as 1949 Geneva Convention I]. The three other Geneva Conventions of 1949 are the Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as 1949 Geneva Convention II]; the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as 1949 Geneva Convention III]; and the Geneva Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

11. Protocol II, *supra* note 6.

It may behoove us here to compare these provisions with the statement made by 'Ali ibn Abu-Talib to his soldiers during his war with Mo'awiyah.

If you defeat them, do not kill a man in flight, do not finish off a wounded man, do not uncover a pudendum, or mutilate the dead, do not rip open a curtain or enter a house without permission, do not take any of their property, and do not torture or harm their women even though they may insult your leaders, and remember God, mayhap you will have knowledge.

The regulations of the Geneva Conventions pertaining to armed conflict of a non-international nature are less bold and their guarantees are much weaker than those contained in the provisions pertaining to international armed conflict. The philosophy underlying the division of the Convention provisions on humanitarian law into two protocols is, itself, based on the desire to withhold the greater guarantees from combatants in non-international armed conflict. As for the Islamic system, it takes a diametrically opposed stance. It takes a more sympathetic view of armed conflict with rebels and Kharijites, offering them rules and guarantees that it withholds from polytheists and apostates engaged in international armed conflict.

3. The Fight Against Apostates

The fight against apostates is the fight against people who were declared Muslim but who later reneged their Islam. About these, the Prophet said, "He who changes his religion, kill him." He also said, "A Muslim's blood shall not be lawfully shed except for three causes: atheism after belief; adultery after marriage; or killing a person otherwise than in retaliation for another person." The relationship between this fighting and international law falls within the sphere of humanistic law, the law that regulates the rights of man in times of peace, rather than humanitarian law.

But if apostates should move to a land separate from the land of Muslims where they cannot be reached, if they become a de facto government exercising sovereignty over part of the Islamic territory, then they should be fought on account of their apostasy. War shall be waged against them, after due notice and warning, in much the same manner that war is waged against foreign enemies. There are, however, four differences between a war against such apostates and a war against foreign enemies:

- (1) No truce can be negotiated, nor peace concluded with apostates in their own land, whereas peace can be made with foreign enemies;
- (2) It is not permissible to compromise with apostates by acknowledging their apostasy in return for a financial consideration though such a compromise can be concluded with a foreign enemy;
- (3) Apostates cannot be enslaved, nor can their woman be taken captive though foreign enemies can be enslaved and their women can be taken captive (jurists differ on this point).

(4) The property of apostates shall not be acquired as booty, whereas the victorious combatants shall own the spoils taken from a foreign enemy.

Those who refrain from paying the *Zakāt* (alms) to the *Imām* shall be likened to apostates and accorded the same treatment in the fighting. It is on the basis of the opinion (*Fatwah*) of Abu Bakr and of the Prophet's Companions¹² that the Apostasy War was justified.

B. WARS AGAINST POLYTHEISTS AND APOSTATES

I now move on to armed conflict having an international nature. As promised, I shall cover briefly the provisions of humanitarian international law dealing with this kind of encounter, by reviewing the most important of the general principles governing it. Without fear of being blamed for generalization, I can say that, in positive law, all these principles stem from an important general concept stated in the preamble of the St. Petersburg Declaration of 1868 to the effect that the only legitimate object of war to be pursued by states is to weaken the enemy's military strength.¹³ Consequently, whatever lies within the purview of this object does not conflict with the requirements of humanitarian international law, while anything beyond this purview that is not precluded by a customary or contractual rule will constitute a transgression against what was called in the Second Protocol "the principles of humanity and the dictates of the universal conscience." In this sense, the Holy *Qurān* says, "Fight in the cause of Allah those who fight you, but do not transgress limits, for God loves not transgressors." [2(190)] God has thus prohibited that fighting should go beyond its goals and regards excess as a transgression which He does not love. The Holy Verse is explicit in setting the goal of the fight as the repelling of aggression.

The Prophet is reported to have said, "A powerful and aggressive people once waged war on a weak and tranquil people and God helped the latter to overcome their enemy, but the victors abused and oppressed the vanquished, thereby incurring the wrath of God to the day of resurrection." This is the general principle or basis for a number of rules limiting the freedom of the Islamic State with regard to its mode of conduct. I will group these rules under three headings: (1) the use of arms; (2) the treatment of the enemy in battle; and (3) the treatment of prisoners of war.

12. Abu-Bakr aSiddiq (d. 13 H/634 A.D.), 'Umar ibn al-Khattab (d. 35 H/656 A.D.), 'Uthman (23 H/644 A.D.), and 'Ali ibn Abu Talib (41 H/661 A.D.) were four of the Prophet Muhammad's most closely trusted and devout companions. Following the death of the Prophet, they succeeded each other as the first four *caliphs* (successors) to the religious and political leadership of the Islamic community.

13. Declaration of St. Petersburg of 1868, 58 British and Foreign State Papers 16 [hereinafter cited as St. Petersburg Declaration of 1868].

1. The Use of Arms

Humanitarian thought is keen on alleviating the ferocity of military conflict as much as possible. As a means of reducing the cruelty of war, it restricts the combatant's right to choose the arms used and precludes the use of arms that cause unwarranted pain. However, it still shies from laying a definitive rule in this connection and the general rules formulated to achieve this end are weak and fragmentary.

The latest of such rules are laid in article 35 of the first Protocol of the Geneva Convention of 1949.¹⁴ This article contains two rules relevant to this discussion. The first states, "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited."¹⁵ This wording is so vague that we can safely say that it reads more like advice or an entreaty than a binding obligation and a rule with which signatories must comply. The second provides, "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."¹⁶ This provision trembles in the face of the defiant passions of the states; it does not dare to prohibit decisively the use of total destruction arms, but resorts to the evasive stratagem of adopting a language which leaves the door wide open for the violence and injustice to which some states may be inclined. The St. Petersburg Declaration of 1868 may be said to constitute a greater restriction on the discretion of states because it requires that suffering should not exceed the limit necessary to render the enemy incapable of fighting.¹⁷ I ask myself, "How did states muster the courage a century ago to include this restriction in the St. Petersburg Declaration as a desire or an aspiration, and then lose that courage when they were converting that Declaration into binding and mandatory legal provisions?"

I may be accused of ignoring international conventions that proscribe the use of certain arms of total destruction, such as the Geneva Protocol of 1925,¹⁸ which prohibits the use of asphyxiating and poisonous gasses and germ and chemical weapons. A closer look at these conventions will show, however, that they were concluded to proscribe a weapon after it actually had been used to the detriment of humanity, or were most probably signed after the world had discovered a more powerful and deadlier weapon. Are we not witnesses today to a byzantine discus-

14. Protocol Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 35, U.N. Doc. A/32/144 Annex 1 (1977) [hereinafter cited as Protocol I].

15. *Id.* at art. 35(1).

16. *Id.* at art. 35(2).

17. See St. Petersburg Declaration of 1868, *supra* note 13.

18. Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. 8061, 94 L.N.T.S. 65 (entered into force for the U.S., April 10, 1975).

sion about the proscription of nuclear weapons? No wonder, therefore, that article 36 of the First Protocol¹⁹ should leave the desirability of using new weapons to the discretion of the signatory states. An actual agreement among states on such a matter is most improbable.

It is most probable that this problem was not of any concern to early Muslim jurists because it was not known to them. The weapons used in war at the time lacked the technology which could qualify them as weapons of total destruction or as causing damages in excess of what is necessary to put the enemy out of action. However, later Islamic scholars did not miss this point completely. In fact, I have read that Khalil al-Maliki, in his summary book on *Jihād* (holy war), said that a combatant is prohibited from using weapons capable of causing his opponent injuries that exceed the possible benefit achieved by the combatant. He gave an example which was consistent with the military thinking of his time, that the use of poisoned arrows was prohibited because such arrows could cause unjustified suffering to the victim. The rule in this connection is specific in condemning violence—it even specified the weapon concerned and proscribed its use.

The opinion of this scholar is supported by the general rules of Islam which prohibit excessive killing even when it is authorized. The Holy Verse says, "If anyone is killed wrongfully, we give to his next-of-kin authority but let him not be extravagant in killing." [17(33)] In this vein, Abu Huraira reports the following incident about the Prophet. When he dispatched Abu Huraira with a group of men to do battle, he said to the group, "If you come across so and so and so and so, burn them both." But when he was preparing to leave, the Prophet said, "I ordered you to burn those two, but God alone punishes with fire. So if you find them, kill them." This change of mind on the part of the Prophet from burning to killing constitutes in my opinion a tradition of proscribing injuring the enemy with a weapon that causes unjustified pain.

The Prophet's saying that "[f]airness is mandatory. If you kill, do it properly," is, in my opinion, a direct provision in this matter. 'Omar actually removed Khalid because the latter had killed the enemy excessively. He said, "Khalid's sword is indeed violent." He liked the way 'Amr ibn Al-'As fought because his battles resulted in less killing. 'Omar called 'Amr's war "a lenient war."²⁰ In a tradition of the Prophet reported by Ibn Hatim, Muhammad says: "If one of you fights his brother, let him avoid the face because God created Adam in His own image." Injury to the face is prohibited or at least disapproved, except in necessity, thereby preventing the excessive use of weapons beyond humanitarian limits.

In protecting the enemy from suffering, Islam has surpassed the achievements

19. Protocol I, *supra* note 14, at art. 36.

20. Khalid ibn Walid (d. 21 H/641–42 A.D.) and 'Amr ibn Al-'As (d. 42 H/663 A.D.) were contemporaries of Muhammad who converted to Islam while Muhammad was in Medina. The two were among the most successful military leaders in early Islamic history.

about which humanitarian western civilization is boasting. Let no one try to disprove what I have stated by alleging that 'Ali ibn Abu Talib burnt a number of his own allies, the followers of ibn as-Sa'uda 'Abd Allah ibn Saba who were Jewish, because they were saying that God had become incarnate in 'Ali, with the intent of misleading Muslims. This story cannot be found in history books, although the burning of a group of people at the outset of Islam by companions of the Prophet who were virtuous Muslims is not an incident that would be ignored by historians or one that historians would fail to refute and totally overlook.

Islamic thought has another goal in connection with weapons, namely to prohibit their random use in a manner that would affect both combatants and non-combatants and hit military targets indiscriminately. The combatant has thus a twofold obligation: to distinguish the combatant from the non-combatant and to direct his weapon to the former; and to make a distinction between military and non-military targets and confine his attacks to the former. The obligation of the Muslim combatant to make the first distinction is supported by a tradition according to which the Prophet saw people gathering after one of his battles and sent a man to find out the reason. The man returned and told the Prophet that a woman had been killed, whereupon the Prophet said, "She certainly could not have been fighting." In another instance, some Muslims, acting like their enemies, killed a number of children. Angrily, the Prophet said, "Why is it that some people are so aggressive today as to kill progeny?" These comments on the part of the Prophet are clear indications of the necessity of making a distinction between combatants and non-combatants, and constitute disapproval of the random use of weapons against combatants and non-combatants.

The Muslim combatant is not permitted to push killing to the point where he does not distinguish between combatants and non-combatants. In Islam, a combatant is a man fit for fighting, whether he takes part in the battle or not. Islam imposes on the Muslim combatant the duty to double his caution if there are non-combatant Muslims among the enemy in order to avoid hurting such non-combatant Muslims and incurring the ensuing disgrace or sin. It may help the enemy to distinguish the combatant from the non-combatant if combatants wear a special uniform or carry a particular badge. It is reported that the Prophet used to wear a special robe ('aba) during military marches. There is no evidence, however, that there was any organized effort during the lifetime of the Prophet to provide combatants with a uniform, except for a report that in the battle of Badr Muslims wore a distinctive sign consisting of a piece of wool. This led at-Tabari to state in his interpretation or exegesis, "Wool was used for the first time on that day," meaning the day of the battle of Badr.

Regarding the Muslim combatant's obligation to distinguish military targets from civilian targets, ash-Shafi'i²¹ stated that catapults could be directed against

21. There are four major schools of legal thought dominating Islamic jurisprudence today. They are named after Imam ash-Shafi'i (d. 204 H/820 A.D.), Malik ibn Anas (d. 179 H/795 A.D.), Abu Hanifa (d. 150 H/767 A.D.), and Ahmad ibn Hanbal (d. 24 H/855 A.D.), leading Islamic jurists of

a fortress, but not toward inhabited houses. The idea expressed by ash-Shafi'i that inhabited dwellings be spared (unless these are too close to the fortress) can only be justified by an obligation to limit assaults to military targets. Let us not forget that destruction for the sake of destruction is prohibited in Islam, especially if, as in the majority of cases, the land would revert to Muslims after the conquest. Scholars have made a distinction between property acquired by Muslims by force and property acquired by chance or occupied as a result of a peace. In fact, assault against military targets without justification is a form of transgression prohibited by God, and a departure from justice ordered by the Almighty when He said, "My Lord has commanded justice." [42(15)] God declared His love for those who act justly when He said, "Allah loves those who deal fairly." [5(42)] To explain the meaning of justice, He said, "We shall place the balances of justice on the day of resurrection." [21(47)]

2. *The Treatment of the Enemy in Battle*

This may consist of actions directed at the enemy in combat or at the civilian population in the territory of the enemy. I shall begin with the combatant. The first precept of humanitarian international law may be that a combatant should refrain from killing, wounding, torturing or ill-treating the enemy, whenever the latter becomes incapable of combat, whether through surrender of his weapon or through surrender of his person.

This basic rule of humanitarian international law is recorded in article 23(c) of The Hague Convention of 1907²² and confirmed by article 38 of the First Protocol²³ and article 7 of Second Protocol²⁴ to the Geneva Conventions. In fact, the humanitarian international law of Islam is extremely interested in this principle which is the object of many verses and traditions. God Almighty orders Muslims to act straight with their enemies when He says, "As long as they act straight with you, act straight with them; verily Allah loves those who show piety." [9(7)] He also orders Muslims to be inclined to peace. "If they incline to peace, incline thou to it, and set thy trust upon Allah." He also denies the Muslim combatant the right to injure his foe if the latter withdraws and ceases to fight. The Holy *Qurān* says in this connection, "If then they withdraw from you and do not fight

their day. These schools differ in their view of the role of human reason in interpreting law from the *Qurān* and the traditions of the Prophet. The *Al-Maliki* school places primary emphasis on consensus among Muslim jurists (*ijma'a*). The *Al-Hanbali* school defines legal rules on the basis of Qurānic passages and the practice of the Prophet only. Followers of Ash-Shafi'i take a view somewhere in between the *Al-Hanbali* and *Al-Maliki* schools. They supplement divine inspiration through the Prophet's actions with consensus and reasoning. See N. COULSEN, A HISTORY OF ISLAMIC LAW 70-73 (1964).

22. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23(c), 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague Convention].

23. Protocol I, *supra* note 14, at art. 41.

24. Protocol II, *supra* note 6, at art. 7.

against you, but offer you peace, Allah has not opened for you a way against them.” [4(90)] Hisham ibn Hakim said, “I testify that I have heard God’s Messenger say that God will torture those who torture people on this earth.” The Prophet also says: “Cultivate the goodwill of people and treat them gently, do not attack them until you have called them (to embrace the faith). I would rather have you bring me any urban or nomad people having embraced Islam, than bringing me their women captives after having killed their men.”

Islamic war is, therefore, instigated by kindness inasmuch as it prefers cultivation of goodwill to killing and does not allow killing without a pressing necessity.

The second rule, which is as important as the above mentioned principle and is connected to it, prohibits a combatant from resorting to treachery in order to kill, injure, or capture his enemy. This rule is upheld by article 23(b) and article 24 of The Hague Convention of 1907²⁵ and dealt with in detail in article 37 of the First Protocol.²⁶ In this connection the rules of humanitarian international law make a distinction between ruse and treachery, and allow ruse but proscribe treachery, which is defined in the said Protocol as “perfidy.”

Islamic theory also upholds this distinction. The Prophet has described war as a ruse. Therefore, an enemy may be killed in surprise. The Prophet used to send his agents to infiltrate the ranks of the enemy and to spread defeatism and rumors among the enemy in order to undermine their morale. During the battle of the trench (Al-Khandaq), Na‘im ibn Mas‘ud came to the Prophet and said, “O Messenger of God, I have embraced Islam but my people do not know that I have. Command me to do what you wish.” The Prophet answered, “You are but one man if you stay with us, but go and dishearten the enemy if you can, for ruse is invaluable in war.”

An interesting example of ruse is given by ibn Shaddad in his book entitled, “an-Nawadir as-Shultaniyah,” where combatants put hogs on board ships instead of soldiers in order to mislead the enemy. In another example it is reported that Hajjaj ibn Alat as-Salmi embraced Islam and fought with the Prophet at Khaybar. When Khaybar was conquered, he said, “O Messenger of God, I have property in Makkah with my wife Umm Shaybah daughter of Abu Talha, as well as assets with various merchants of Makkah, allow me O Messenger of God to go there.” The Prophet gave him permission to go, whereupon he said, “O Messenger of God, I shall perforce have to lie there.” The Prophet told him to say what had to be said. In other words, the Prophet’s permission was sought by Hajjaj that he might resort to ruse with the inhabitants of Makkah in order to recover his property and assets. So, when he reached Makkah, his people asked him about news from Khaybar. He told them that Muhammad had suffered an unprecedented defeat and that his followers had either been killed or taken captive and that the people of Khaybar refrained from killing Muhammad but would send

25. Hague Convention, *supra* note 22, at arts. 23(b), 24.

26. Protocol I, *supra* note 14, at art. 37.

him to Makkah to be executed there in retaliation, whereupon the Makkans rejoiced. Hajjaj took this opportunity to ask them to help him recover his property so that he could return to Khaybar and buy some of the booty before other merchants arrived. They returned his property at an unheard-of speed.

According to an-Nawawi,²⁷ scholars are unanimous in allowing ruse in war with the unbelievers whenever this is possible, unless there is a covenant or an assurance of protection given to them. The Holy Verse says, "Do not violate oaths after their confirmation." [5(90)] Islam, however, does not permit treachery. The Prophet once said: "He who cheats us is not one of us." When Abu Jandal ibn Suhayl fled to Medinah from the polytheists of Makkah, he heard that the Prophet intended to return him to his people in execution of the Prophet's covenant with the latter. Abu Jandal stood up among the Muslims and asked them if they would return him to the polytheists who would torture him to renounce Islam. The Prophet answered, "Treachery is not good for us, even to save a Muslim from the law of polytheists."

Similarly, it is reported that 'Umar ibn al-Khattab heard that a Muslim soldier had said to a Persian combatant, "Do not be afraid," then killed the Persian. Thereupon Umar wrote to the commander of the army in these terms, "As God is my witness, if I hear anyone has done this I shall cut his neck." In this connection, ash-Shafi'i says, "Whatever is accepted by the Muslims and receives their consensus as being permissible in the land of Islam is not forbidden in the land of unbelievers, and whatever is forbidden in the land of Islam, is also forbidden in the land of unbelievers. He who commits a forbidden act will receive the punishment prescribed by God for his offence. The fact that the act was committed in the land of unbelievers shall not reduce his guilt."

An Islamic combatant is also forbidden to annihilate the enemy, threaten them with annihilation, or deny them the right to surrender. This same rule is laid down in article 40 of the First Protocol²⁸ and article 4(1) of the Second Protocol²⁹ in support of the text of article 23(d) of The Hague Convention of 1907.³⁰ However, the Islamic rule on this matter predates all others. The precepts of Islam on the subject are included in the purport of the verses quoted above, whereby Muslims are commanded to incline to peace if the enemy inclines to it and are prohibited from killing an enemy who withdraws from the battle, surrenders his weapon and his person.

It has never been reported that any people were annihilated or killed as a group after the defeat of the enemy. The attitude of the Prophet toward the inhabitants of Makkah after it was conquered is the best evidence which can be adduced in this connection. The Prophet freed them all, and they are known in history as "at-

27. An-Nawawi (d. 676 H/127 A.D.) was a highly respected Syrian jurist of the *Shafi'i* school.

28. Protocol I, *supra* note 14, at art. 40.

29. Protocol II, *supra* note 6, at art. 4(1).

30. Hague Convention, *supra* note 22, at art. 23(d).

Tulaqa”—those who remained heathen until the surrender of Makkah and were set free. The Arabic word “*Taliq*” means freed or released. “*Tulaqa*” is its plural form.

Here a whisper may spread about the fate of Bani Qurayza. But the full story of these people disproves the suspicion it raises. We know that the Messenger of God entrusted Bani Qurayza with the protection of the Muslims’ rear during the Battle of the Trench (at-Khandaq), that Muslims were in such distress in that battle that the Prophet offered the tribe of Ghatfan one third of the date crop of Medinah if they did not fight him and his companions, and that the Jews of Bani Qurayza did not hesitate to miss the opportunity to attack the Muslims after breaking their promise and joining forces with the polytheists. When the distress ended, the Prophet called ‘Ali and gave him the command of the campaign against Bani Qurayza. When ‘Ali drew near to their fortifications, he heard them insult the Prophet. Next morning, the tribe of al-Aws hurried towards the Prophet saying, “O Messenger of God, these are our clients and not those of the tribe of al-Khazraj, and yesterday you treated the clients of our brethren (meaning the tribe of Bani Qaynaqa’ whom the Prophet had freed) well.” This discussion ended and the Jews agreed to arbitration by the head of the tribe of al-Aws, Sa’d ibn Ma’az, who decided their fate according to the precepts of their own religion and the rules set forth in their Book, namely that the men be killed, their property be divided, and their women and children be led into captivity. This incident is not a form of annihilation, but represents an award rendered in an arbitration requested by the party concerned and accepted by them as a judgment and as law. This is in full agreement with the rules set forth in the Geneva Convention of 1949 with regard to prisoners of war and protected persons. The rule applied to Bani Qurayza is not Islamic, but an application of Deuteronomy, the enemy’s Book.

This deed, attributed to Islam, was in fact a result of deference to the law of an enemy, an enemy who was excessively vindictive and very stubborn. How can we but praise the Muslims’ attitude, knowing that when the temperature soared on that summer day, the Prophet said, “Do not add the heat of this day to the heat of the sword; defer their execution until they cool down.” Furthermore, they refused to choose the Prophet for an arbitrator, and we know that his ruling regarding their neighbors, the tribes of Bani an-Nadir and Bani Quaynaqa’, affected their property but not their lives.

I shall relate a story reported by Abu Hurayrah because it confirms the Islamic ruling in this connection. Abu Hurayrah said that he had heard the Messenger of God relate the following parable. “An ant bit a Prophet whereupon he ordered the ant hill to be burnt. Then God said to him, ‘If an ant bites you, would you burn a whole community of ants who sing the praises of God?’ ”

As regards refuge, this is covered by an express *Qurānic* text. God says, “If one of the polytheists asks thy protection, grant him protection until he hears the word of God, then see that he reaches his place of security; that is because they

are a people who have no knowledge.” [9(6)] Al Awza‘i³¹ was once questioned about the verse: “And where is his place of security; do you think that if he says my place of security is in Constantinople, we should take him there?” Al-Awza‘i answered, “If he reaches one of their fortresses or one of their strongholds, this would be his place of security.” Al-Awza‘i was then asked, “What if the polytheists are met by a Muslim patrol in their country before they reach their place of security?” Al-Awza‘i answered, “The patrol should not stand in their way.” He was then asked about the enemy who enters Muslim land under a safe conduct which is valid until his return and, on the way back to his country, climbs a mountain within his own territory but is forced by strong winds to return to Muslim land. If the enemy then says, “I am here under safe conduct, what should be done?” Al-Awza‘i answered, “I am of the opinion that he is entitled to remain protected by the safe conduct.”

This verse leads to a brief comment on “safe conduct” or “assurance of protection.” This is one of the generous Islamic systems that characterize Islamic law and distinguish it from other laws. “Assurance of protection” prohibits slaying, enslavement, and the taking of property, providing the protection was given voluntarily by a sane Muslim. It is valid when it is given by a private citizen, as well as when it is given by an *Imām* or an *Amir*. Assurance of protection—whether given by a free man or a slave, by a man or a woman—usually covers a small number of people. According to scholars it applies to not more than ten individuals, a small caravan, or a fort. So, if a Muslim says to his adversary, “Lay down your weapon first and fear not,” he has given him an assurance of protection. And if the enemy leaves his fort on the basis of a signal of assurance of protection, he may not be killed and must be returned to his place of security. I would say more about the rules governing “assurance of protection” but for my desire to cover the topic of this article.

The Islamic combatant may not inflict collective penalties, especially those tinted with vengeful deterrence. This rule is implied by the provisions of article 46 of the First Geneva Convention,³² article 47 of the Second Geneva Convention,³³ article 20 of the First Protocol,³⁴ and article 15 of the Second Protocol.³⁵ All these texts prohibit acts of deterrent vengeance against the wounded, the sick and the shipwrecked, as well as against individuals, ships, or material protected by the conventions.

The international community may have felt that its human endeavors in this field were deficient when the United Nations Organization was formulating the

31. Al-Awza‘i (d. 157 H/774 A.D.) was a Muslim jurist who lived primarily in Damascus and Beirut.

32. 1949 Geneva Convention I, *supra* note 10, at art. 46.

33. 1949 Geneva Convention II, *supra* note 10, at art. 47.

34. Protocol I, *supra* note 14, at art. 20.

35. Protocol II, *supra* note 6, at art. 15.

Treaty of 1948 on the crime of collective annihilation and genocide.³⁶ Article 2 of the Treaty defined the crime of collective annihilation as: (1) killing the members of a community; (2) causing grievous physical or mental injury to the members of a community; (3) willful imposition of living conditions capable of destroying or breaking the life of the whole or part of the community; (4) imposition of regulations intended to prevent procreation in the community; and (5) moving the children of the community to another community by force.³⁷

Prohibition of collective punishment in Islam is of general application. It is not restricted to any particular class or group and makes no discrimination. The general rule in Islam is that “[n]o burden bearer bears the burden of another” [53(38)] and that “God lays not upon anyone more than he has capacity for; what he has gained stands to his credit and what he has piled up stands against him.” I do not hesitate to say that the detailed provisions of the convention on the crime of annihilation are covered by the injunction and prohibitions of the Islamic theory and may be regarded as an explanation and expounding of its precepts.

As regards vengeful deterrence, there are verses in the Holy *Qurān* that set forth the principle of punishment. “The recompense of any evil deed is an evil like it.” [53(31)] “As for those who have piled up evil deeds, the recompense of an evil deed is its like.” [40(40)] “If you take vengeance, take it only in the measure that vengeance was taken from you; but assuredly if you endure patiently, it is better for those who patiently endure.” [42(40-44)] “The sacred month for the sacred month, things sacred being subject to the law of retaliation; so if any make an attack upon you, make a like attack upon them; show piety towards God and know that God is with those who show piety.” [2(195)] By their clear implication, these verses establish the principle of reciprocity in punishment. One may imply from these verses that they permit Muslims—in reciprocity—to practice vengeful deterrence against the enemy, if the latter practices it against them.

This inference, however, can be criticized on two counts. First, vengeful deterrence, in its modern meaning intended in the articles of humanitarian international law conventions, is an illegitimate action taken by a state in vengeance against another state with the intent to force the latter to accept the settlement of a dispute which had resulted from a previous illegitimate action taken by that latter state. Consequently, vengeful deterrence is an illegitimate action in retaliation for an illegitimate action. It is inconceivable, however, that Muslim forces who abide by the precepts of Islam would take illegitimate actions against the enemy which would justify acts of vengeful deterrence against them by the enemy. It ensues from the foregoing that the hypothetical case given lies beyond the scope of the proper application of Islamic precepts.

36. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1978, 78 U.N.T.S. 277.

37. See *id.* at art. 2.

Second, the application of the rule of reciprocity, posed above, is, in Islam, subjected to an important limitation, namely, that a Muslim is not allowed to follow the example of the enemy in their misdeeds. Some people may wonder that virtue should rule in the midst of swords where the taking of human life is permissible. Indeed, where permission is given, no prohibitive restriction remains. But it is the war waged by virtue against transgressive vice, and it is illogical that war in defense of virtue should be waged in the field in a manner that violates the precepts of virtue in order to keep pace with the aggressors. War by Muslims is, therefore, restricted by virtue and never transgresses its limits even though the aggressors may transgress those limits. If the enemy mutilates the bodies of dead Muslims we do not do the same with their dead because the Prophet said, "Be careful not to mutilate the dead." When the polytheists killed Hamza ibn Abd al-Muttalib in the battle of 'Uhud and ferociously mutilated his corpse, the Prophet was deeply affected by their action because Hamza was his uncle and the relative he loved most. Nevertheless, he never thought of mutilating the dead body of an enemy in subsequent wars. Even if the enemy keeps prisoners of war hungry or lets them die of thirst, the army of virtue does not act like the enemy in this matter because the Almighty has commanded that prisoners be treated well and the Prophet prohibited that any man condemn another to die of thirst.

The rules of humanitarian international law prescribe that the wounded and the sick be respected and be given humanitarian treatment. For this purpose medical organizations were given special consideration; it is from this concept that many of the rules imposed by the Geneva Convention of 1949 and their two protocols with regard to the wounded, the sick, the shipwrecked, and medical organizations, were derived.³⁸ To show the extent of the respect with which Islam treats the wounded and the sick enemy, I merely recall the story about Salahuddin al-Ayyubi and Richard Coeur de Lion, when the latter was taken ill. Salahuddin covertly went to his enemy's camp and treated him until he recovered, although Richard was the strongest and the fiercest Crusader. The story shows that Muslims not only take care of the wounded and the sick who are in their hands, but also extend their care to include the wounded and the sick in their enemy's camp. Whatever the motive of such action may be, Salahuddin would not have acted as he did if the action was contrary to the teachings of Islam.

I do not think I would be wrong to say that the commission of an illegitimate act against the wounded, the sick, or others who are protected by temporal conventions cannot be accepted by the Islamic theory within the scope of the foregoing explanations.

It is worthy of mention here that the traditional Islamic theory did not deal in detail with the case of the shipwrecked at sea because the early Muslims' concern

38. 1949 Geneva Convention I, *supra* note 10; 1949 Geneva Convention II, *supra* note 10; Protocol I, *supra* note 14, at arts. 8–34; Protocol II, *supra* note 6, at arts. 7–12.

with naval warfare was limited. Nevertheless, they regarded a ship as a fort and applied to her and to those on board the same rules that they applied to an enemy fort. I reiterate here that the rules set forth in humanitarian international accords in this connection constitute, in their entirety, details of the Islamic theory and are consistent with the practical application of its rules.

I shall now deal with the personal relations of combatants. Two major statements were made on the subject by the Prophet and by his first successor, Abu Bakr as-Siddiq. The Prophet commanded, "Go forth in the name of God and with the blessing of the Messenger of God, but do not kill a very old man, nor a child, nor a woman, and do not be treacherous. Gather your prizes, set things right and do well, for God loves those who do well."

According to the two statements, the Muslim army is prohibited from killing an old man or a man suffering from an incapacitating chronic disease, unless either has a say or counsel in the war. In the latter case they become leaders of atheism, about whom the *Qurān* says "[f]ight the leaders of unbelief, no oath will hold in their case, mayhap they will refrain." [9(12)] The truth is that this verse is of general application and came down in connection with the polytheists of Quraish. These were the people meant by Abu Bakr when he told the soldiers that they would meet people who had shaved the middle of their scalp. Abu Bakr counselled the soldiers to strike down with their swords those who served as strongholds of the devil.

The statement also prohibits the Muslim combatant from killing a child or a woman. Some Muslim scholars, holding views similar to those embodied in the rules of Western, humanitarian international law, maintain that immunity for a woman or a child is conditional upon their taking no part in military action. However, when Malik was asked whether Muslims should kill enemy women and children who stand on the ramparts and throw stones at the Muslims and cause confusion in their ranks, he answered, "The Prophet has forbidden the slaying of women and children." When Al-Awza'i was asked about women and children capable of guiding the enemy, he said that they were not to be killed on suspicion, but only if they actually acted as guides.

The killing of craftsmen, wage earners, and farmers who do not do battle, or those who follow the army but do not participate in the hostilities, such as merchants, is also prohibited by the statements. All of these people are given immunity because they are builders of prosperity who devote their efforts to civic matters; Islamic war does not have for its object the destruction or undermining of civilization and prosperity. Similarly, Islamic combatants may not kill monks, including all non-Muslim priests who live in cells or as hermits and are from the people of the Book (Christians). This immunity is conditional upon monks or hermits remaining in their churches or cells.

I now must turn to the matter of depriving civilians and the civilian population of necessary food and water with the intent of starving them or forcing them to leave. Islam prohibits the slaughter of animals unless it is necessary for food.

Islam prohibits the killing of animals by burning lest their economic value should be unjustifiably wasted. The Prophet has indeed prohibited the slaughter of any animal in captivity except for military necessity, as in the case where an animal can be used to strengthen the enemy. Also, if the Muslims go out on a campaign and do not find food to buy for a price, or if people refuse to sell food to them, they can take it by force to meet their needs. When Islam permitted water to be cut off from the enemy or polluted by blood, filth, or poison, it was aimed at combatants and not civilians. Permission for such acts was limited by necessity.

If Muslims depart and leave food which they do not need, they shall not burn it unless it would strengthen the enemy. This means that they are not allowed to destroy food except for military necessity. In Year 6 of the *Hijrah*,³⁹ Thumamah, Chieftain of Yamamah, decided to withhold supplies from Makkah, whose inhabitants depended on his tribe's grain, in order to force the Mekkans to embrace Islam or until the Prophet ordered Thumamah otherwise. When Makkah was threatened with famine, its inhabitants asked that the embargo be removed, and the Prophet wrote to Thumamah to remove it. The Prophet even sent ripe dates to Makkah while hostilities were at their peak, and he gave a big amount of money. Needless to say, Makkah was at war with the Prophet from the time he left it to emigrate. His ruling to prohibit destruction, which I shall deal with later, supports and complements my statement.

I now move to the subject of a combatant's obligation as regards the property of his adversary. Very briefly, I would say that the basic obligation here consists of distinguishing between military targets and civilian property so that the latter can be saved from destruction. Abu Bakr's commandment expressly prohibited destruction and who better knew about the Prophet's true guidance than his close companion who was with him in the cave.

Some scholars, however, held that it is permissible to destroy buildings and to cut down trees. These scholars looked to the *Qurānic* text which says, "The offshoot in fruition which you cut or left standing on its trunk, it was by leave of God." [59(5)] They likened the "offshoot in fruition" to the "palm tree." They also drew support for this view from the fact that the Muslims had struck the dwellings of Bani an-Nadir on the orders of the Prophet, and the report that the Prophet had ordered the burning of the palace of Malik ibn Awf, the army commander of Tayif, and ordered the destruction by the catapult of the fortress of Tha'if, and the cutting down of their orchards.

A first glance at these reports shows us that they do not allow destruction in an absolute manner, because a "tendershoot in fruition" did not mean a "palm tree," but the fruit of a palm tree. The *Qurānic* text, "The offshoot in fruition which you cut or left standing on its trunk, it was by leave of God," cannot mean the trunk of the palm tree but only the fruit standing on such trunk, and cutting

39. The *Hijra* was the emigration of Muhammad and his followers from Mecca to Medina in 622 A.D. and represents the beginning of the Islamic calendar.

fruit does not constitute destruction. Furthermore, Abu Zahrah explains the destruction of the houses of Bani an-Nadir as follows:

This was done because they had used them as forts in which they took shelter and caused injury to the Muslims, so it was imperative to destroy those houses or to try to do so to protect the Muslims against injury. The companions of the Prophet did only what was necessary, but when the Jews realized that they would hand over their houses to the Muslims and leave, they destroyed them completely.

This sense is clear in the Holy Verse because the destruction was not the work of the believers alone; the Jews themselves participated in it. "They made their houses desolate with their own hands and the hands of the believers." [59(12)] As for the artillery assaults on the forts, this was permissible because they represented strongholds of a powerful and rough people and because destruction of forts is intended to weaken the enemy. The threat to cut down the orchards of Tayif was made because the fruit was used to make wine. It should be noted, however, that in order to encourage the enemy to surrender and to reduce the bloodshed, the Prophet did not carry out his threat. I would say that we should add to the foregoing that when Al-Aswad, a slave belonging to a Jew, surrendered to the Prophet with some cattle belonging to his master during the battle of Khaybar, the Prophet said to him, "Go somewhere else and send them towards their owner."

C. *The Treatment of War Prisoners*

Divine guidance has provided precepts on this subject which modern international covenants and customs have not been able to equal. The starting point in determining the legal status of a prisoner of war is that the enemy state is responsible for his safety; he is not under the control of the combatant who captured him. Islam has made this point quite clear in the Holy *Qurān* which says, "Therefore, when you meet the unbelievers (in battle), smite their necks; at length when you have thoroughly subdued them, bind them fast, and then either freely or by ransom (set them free) until war lay down its burden." [47(4)]

This Holy verse orders Muslims to fight until they subdue the unbelievers and achieve victory over them, then to bind them fast and take them prisoners. Once the enemy is in captivity, the fighting ends and there only remains one alternative: to free the captives out of generosity or for a ransom. The Islamic rule is that the order to fight has for its object the capture of the enemy. The option thereafter is left to the *Imām*. Consequently, the prisoner of war is in the custody of the *Imām*, who is responsible for his safety, until he decides his fate. This is why the Prophet said "[l]et no one interfere with his brother's captive and then kill him." 'Abd Allah ibn 'Amir⁴⁰ is reported to have sent to Ibn 'Umar a captive

40. 'Abd Allah ibn 'Amir (d. 59H/680 A.D. was a military leader and governor of Basra during the caliphate of Uthman.

so that he might kill him. Ibn 'Umar said, "By God I swear that I shall not kill a bound man," meaning that he did not have the right to kill the man after he was taken prisoner and bound fast because the man's fate was then up to the *Imām*.

Scholars are unanimous that the captor is answerable for the killing of his captive, but they differ about the penalty. Al Awza'i says that if the captor kills his prisoner before reporting to the *Imām*, he shall be punished, and if he kills the prisoner after reporting to the *Imām*, he shall be punished and ordered to pay a fine equal to the price of the prisoner. Ash-Shafi'i, in contrast, holds that no fine is due unless he has killed a child or a woman.

Captivity does not, however, divest the prisoner of his status as a combatant. He is a combatant who has become incapable of fighting because he has fallen captive in our hands. Therefore, this status must be terminated by some action. The majority of scholars hold that in terminating captivity, the *Imām* has four options: generosity, ransom, killing, or captivity. The verse quoted above clearly states that the prisoner shall be freed either out of generosity or for a ransom. The two other options represent a doubtful addition.

I believe that freeing the prisoner out of generosity should be given first consideration by the *Imām*. And the *Imām* should not turn away from it unless the interests of Muslims dictate otherwise, because the Holy Verse mentioned that the former is to be given priority over the latter. God also says, "O Prophet, say to the prisoners who are in your hands, 'If God knows any good in your hearts, He will give you something better than what has been taken from you and will forgive you; God is forgiving and compassionate.'" [8(70)]

Generosity may or may not be conditional. If it is, the prisoner will have to abide by the condition set forth in his case. The Prophet at the Battle of Badr freed a poet called Abu 'Azzah after the latter had given a formal promise never to join anyone who is fighting the Prophet. But Abu 'Azzah joined the polytheists in the Battle of 'Uhud and was taken prisoner by the Muslims. He pleaded for mercy with the Prophet who said "I swear to God that you will not wipe your cheeks in Makkah saying that you had mocked Muhammad twice: A believer is never stung twice in the same burrow."

Ransom takes many forms. It may consist of money or property, military material, or something else. At Badr, for example, the ransom was to teach ten children. It is also reported that 'Umar ibn 'Abd Al-'Aziz freed a hundred thousand prisoners in return for the city of Byzantium. If the ransom is the release of Muslim prisoners, this is called an exchange of prisoners. Islamic theory does not insist that the exchange should involve equal numbers of prisoners on both sides and allows that a Muslim prisoner be the ransom for other Muslims. The Prophet ransomed al-'Uqaili, who had embraced Islam, for two Muslim men. Islamic practice also indicates the permissibility of allowing representatives of the enemy to visit the places where prisoners are held so that they may count them and make sure that their number is correct. Islamic practice also indicates that it is neces-

sary to protect the means by which prisoners are transported, so as to reassure them during transportation and thereafter.

Scholars differ on the execution of prisoners; some deny it and some allow it. It is reported from various sources that the Prophet killed prisoners. Ash-Safi'i and Abu Yusef⁴¹ allowed killing if it benefited Muslims by strengthening God's religion and weakening its enemy.

In my opinion, the reports of the Prophet's actions are too simple. Instances in which the Prophet ordered that a captive be killed were limited and rare. Taken one by one, these precedents show that the death penalty was not inflicted upon the captive as such or in exercise of the *Imām's* discretionary power to decide the captive's fate, but as a penalty for acts committed by the prisoners prior to captivity and outside the scope of the battle during which they were taken prisoner. It was a penalty for a crime perpetrated against the Prophet and against Islam, and not because they were captive. This situation is, in fact, envisaged and permitted by article 85 of the Geneva Convention on Prisoners of War, which states, "Prisoners of war who are prosecuted under the laws of the Detaining Power, for acts committed prior to capture shall retain, even if convicted, the benefits of this Convention."⁴²

In case the prisoner had not committed any criminal act before captivity, the *Imām* would have no authority to order his execution, as one of the options he has in dealing with the prisoners. The objection that the public interest of Muslims may dictate the prisoner's execution is unacceptable inasmuch as the interest of the Muslims cannot be harmed by the freeing of a prisoner who is not known to have threatened Islam or Muslims. If there is a necessity calling for the execution of a captive, this would be a matter of expediency on the strength of the principle accepted by civilized states that "necessity knows no law." This distinction most probably never occurred or may not have been very clear to the scholars who allow execution of prisoners.

In making this distinction, I am relying on the fact that fighting is not a crime as long as it stays within the rules and limits set for it, and captivity is not a penal procedure, but is a means of detaining a combatant so that he may not be able to continue fighting. God did not permit that a combatant be killed except in battle and for no other reason. The Holy Verse says, "If they fight you, slay them. . . ." [2(191)] The penalty here was not prescribed as a punishment that can be inflicted upon a prisoner, but as a punishment for an act committed by such prisoner prior to captivity, the latter being just the occasion which placed the criminal in the hands of the Islamic State and made him subject to its sovereign power. I would quote in this connection this statement made by Abu Yusef. He

41. Abu Yusef (d. 182 H/798 A.D.) was a Hanafi jurist and chief *Qādi* (judge) of the *Caliphs* al-Mahdi and *Harun al-Rashid*.

42. 1949 Geneva Convention III, *supra* note 10, at art. 85.

said, "If a combatant is in custody and thus cannot harm Muslims, he will not be blamed for his actions in war, unless he had committed an act before, which will then be held against him."

This is why the Prophet forbade the execution of Abu an-Najtari ibn Hisham, because the latter was the least aggressive. As for 'Uqbah ibn Abu Mu'ayt, he asked the Prophet when the latter ordered his execution, "Will you kill me O Muhammad out of all Quraish?" And the Prophet answered: "Yes. Do you know what this man did to me? He came upon me as I was prostrate in prayer behind the shrine of Abraham, placed his feet on my neck and pressed, and he did not remove them until I thought my eyes would bulge. And another time he brought the gestation sac of a ewe and threw it on my head when I was prostrate in prayer, and Fatimah came and washed it off my head." The singling out of 'Uqbah from among the captives and his execution did not constitute a precedent as regards the *Imām's* right to execute prisoners, but was a punishment for his previous transgressions against the Prophet. An-Nadr ibn al-Harith was among the worst men and a most stubborn infidel. These two were the only prisoners killed among the captives taken at Badr. Some of these captives were freed without ransom, including Abu al-'As ar-Rabi' al-Amawy and Abu 'Azzah the poet. I can even say without risk of exaggeration that such prisoners as were executed had committed acts regarded by Islamic jurisprudence as war crimes and crimes against humanity.

If scholars held varying views on the slaying of prisoners, as detailed above, they were unanimous that polytheists taken prisoners who embraced Islam were spared.

It behoves me to comment here on enslavement, because this is a topic that is sometimes associated with imprisonment and toward which Islam's attitude is often misunderstood. It is difficult to reconcile the adoption of slavery by Islam with the *Qurānic* report that angels kneeled before Adam the man. Moreover, it is an uncontested principle of Islam that men are free and equal. An Arab or a white man does not have more merit than a non-Arab or a black man except by reason of piety. Another principle in Islam is that there is no coercion in religion, and argument should only be conducted in good spirit.

Enslavement found its way into Islamic thought through a back door opened in an era of human decadence. In fact, the Holy *Qurān* always speaks of enslavement in the past tense. This back door represents the international state of mind at a given time in history when slavery was a current practice from which Muslims had suffered greatly because Muslims, taken prisoner by their enemies, were enslaved and sold in slave markets. In Ibn Jubayr's description of his journey, he reports having seen Muslim women and children in great hardship being offered for sale in the Italian slave markets. So Muslims had no alternative but to reciprocate by also allowing enslavement. The humanitarian quality of slavery in Islam, however, was a far cry from the barbarism of the enemy.

Where slavery was permitted, Islam surrounded it with a protective fence of

humanity and tenderness that raised the slave to the level of his master. He was never called a slave, but a "lad" or "servant." The Prophet used to advise Muslims against saying "my slave or my handmaid." He told them to call their slaves "my lad or my lass." The Holy *Qurān* says, "[O]f those whom your hands possess, believing maid-servants." [4(25)] And slaves can validly lead Muslims in prayer. 'Aishah, wife of the Prophet, had a slave who used to lead her in prayer.

Abu Dharr⁴³ was once asked why he would not take his slave's garment, which was of a better quality than his own, and give the lad another garment. He answered,

I have heard the Messenger of God say "They are your brethren whom God has placed under your care. So whoever has a brother under his care, let him feed that brother of the same food he eats and clothe him of the same material he wears, and refrain from asking him to perform work which is beyond his power, but if you do then help him out."

Islam has prohibited harming a slave. The expiation of unjust treatment of a slave is the manumission of that slave by his master. Slaves have also been allowed to purchase their freedom from their masters by agreement. Islam laid down the rules for such a purchase in a manner that almost imposes the will of a slave on his master. The Holy Verse reads as follows: "And if any of your slaves asks for a deed in writing [to earn their freedom], give them such a deed, if you know any good in them." [24(33)] The female slave who bears a son becomes a free woman upon the death of her master. She is emancipated by her progeny.

Slavery in Islam cannot be dealt with in a few lines, and detailed study of the system is beyond the scope of this article. My intent is merely to show that slavery is foreign to Islamic theory and that Islam absorbed the system with a true humanitarian spirit and molded it into a noble and gentle form. Even the term "slavery" (*Riq*) seems to derive from the Arabic word for "gentleness" (*Riqqa*) rather than from the Arabic word for "enslavement" (*Istirqūq*). No wonder, therefore, that the Prophet should remember slaves on his deathbed and enjoin his nation saying, "Show piety to God in your treatment of the weak: women and slaves."

Indeed, slavery is foreign to Islam and it was natural that it should disappear with the disappearance of its causes. Now as the international community today condemns slavery, there is no doubt that slavery is no longer an option open to the *Imām* in dealing with prisoners of war. Muslims are therefore not allowed to enslave their prisoners, because in so doing they would be breaking the rules of their own religion.

Abu Yusef recommends that prisoners be treated well and be given food and clothing at the expense of the State, according to the *Qurānic* Verse which says,

43. Abu Dharr al-Ghifari (d. 31 H/651–52 A.D.), a companion of Muhammad, was highly respected for his piety and asceticism.

“We feed you simply for the favor of God, desiring from you neither recompense nor gratitude.” As a way of honoring the captive, the Holy *Qurān* says, “They give good for His love to the poor, the orphan and the prisoner.” [76(8)] And the Prophet says in this connection, “Recommend to one another that prisoners be well treated.” In fact, Muslims were so courteous to the prisoners taken at the Battle of Badr, that they fed them ripe dates and bread. Salah ud-Din al-Ayyubi set free a large number of crusaders when he did not have enough provisions to feed them, even though the release of such a large number of enemy combatants represented a menace to Muslims if they rejoined their own forces.

Now, as the *Imām* may not make a decision on the fate of a prisoner before the lapse of a certain period of time, the latter needs certain guarantees to protect him during the said period. It may be desirable that I should cover these guarantees briefly below. The first and foremost of these guarantees is respect for the person and honor of the prisoner, thus it is not permissible to torture him. The Prophet is reported to have said, “God will torture those who torture people on earth.” He also forbade mutilation of the dead, even of a rabid dog. His disapproval of torture is shown in the case of Sahl ibn ‘Umar al-Amiri, who was an eloquent orator who devoted his talent to attacking the Prophet and his cause. When ‘Umar ibn Al-Khattab asked the Prophet to allow him to extract Suhayl’s incisors so that the latter could no longer attack the Prophet, Muhammad said, “I will not disfigure him, lest God should disfigure me, even though I am a Prophet.”

Humanitarian principles also dictate that the unity of the family be preserved as much as possible in case of captivity. Hence, scholars are unanimous in stating that it is not permissible to separate from a mother a child who has not changed his teeth or is not yet seven years old. Some scholars, however, allow the separation of spouses in the division of prizes and in case of sale. A prisoner is entitled to correspond with his family if he wishes to do so. The guarantee of correspondence is derived from the guarantee established in favor of messengers or emissaries.

Discriminatory treatment of prisoners is also not permissible for any reason whatsoever. Islam is clear on this point, for we are all descendants of Adam, and Adam was made of clay. However, equality of our human nature does not mean equality of social conditions. References in the *Qurān* are numerous to this effect. “Do not covet what God has bestowed in bounty upon one more than upon another” [4(32)]; “To some of these messengers we gave pre-eminence over others” [2(253)]; “That God should send down part of His bounty upon whomsoever of His servants He wills” [2(190)]; “And have given them great preference over many of those we have created.” [16(71)]

The objectivity of Islam indeed does not allow us to indulge in fantasy and to put all prisoners on the same footing, regardless of rank and social status, provided that we have given each the treatment dictated by humanitarian considerations. When the daughter of al-Maqawqas was taken prisoner, al-Maqrizi said, “Daughters of kings deserve special regard that need not be accorded to others.”

The Prophet is reported to have said, "Be kind to a dignified man who has lost his status." Ibn Asakir quotes the Prophet saying, "If a nobleman falls into your hands, treat him well." It follows that Islamic theory favors that amenities be commensurate with the status of the captive, as long as the minimum human consideration is assured. The prohibition of discrimination was, in the early stages of humanitarian international law, restricted to discrimination on account of nationality. And while the criteria for the prohibition of discrimination have since acquired a wider range, articles 44 and 45 of the Geneva Convention on Prisoners of War⁴⁴ provide that officers and other prisoners having the same status as officers must be treated with due regard for their respective rank and age.

Finally, it should be noted that if a prisoner escapes and reaches his place of security, he becomes free, unless he is bound by a promise. If he is bound by a promise, he shall be under obligation to fulfill that promise because Islam rejects treachery. The Holy Book says, "Verily, God loves not the treacherous." [8(58)]

III. CONCLUSION

This is but a very small amount of the abundance of rules pertaining to humanitarian international law in Islam. These rules are in the nature of rules of public policy. A Muslim cannot break these rules on the pretext that he was under orders from his superiors, for the rule in Islam is that a combatant is held personally responsible for compliance with the provisions of humanitarian international law, for obedience is owed to no man who orders another to commit a sin. It is reported that Alquamah ibn al-Majazzaz had been ordered to pursue the enemy after the battle of Dhul-Qird, but the Prophet recalled him with part of the troops and sent off the rest under the command of Hudhafah ash-Shami. On the way, the latter built a fire and said to his men, "By virtue of my rank, I order you to jump into the fire." But when some of the men moved to obey his command, he laughed and said, "Stay where you are, I was only joking." When the incident was reported to the Prophet, the latter commented, "If any one orders you to do an objectionable thing, do not obey him."

44. 1949 Geneva Convention III, *supra* note 10, at arts. 44, 45.