

ISLAM AND INTERNATIONAL HUMANITARIAN LAW¹

by Yadh ben Ashoor

Contemporary political analyses and studies concerning Islam often bear the mark of ethical values and judgements that obtain in the cultural context of the authors.

In this respect, two main tendencies can be discerned. The first, which we might call "Western-centred", is to be found in the works of specialists in Oriental or Islamic studies who have been trained in the West and are thence impregnated with its culture. When analysing Islam, they judge it on the basis of the moral or political norms pertaining in the West. The second, which could be characterised as "apologetic", generally finds its reflection in the writings of Moslem thinkers who, reacting against the first school's attacks on Islam, try to glorify it and, in particular, set out to identify in Islam all the cultural notions and inventions of the modern world, in other words, the Western world. According to this second school, Islam is, for example, the inventor and disseminator of democratic government, socialism, the separation of powers, human rights and humanitarian law.

The conflict between these two tendencies is more apparent than fundamental. For in fact, both assess Islam in relation to the same reference points, and both—in one case consciously, in the other unconsciously—see Western cultural values as incomparably better. In this regard, the first school implicitly or explicitly condemns Islam and places the Islamic civilization among those imagined to be backward; on the other hand, the second tries to show that Islam is in no way

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backward and merits consideration with the major currents of modern thinking.

The first methodological problem encountered in a subject such as this lies precisely in trying as far as possible to leave aside these two controversial approaches.

The second methodological problem stems from the different historical development that should be taken into account in any comparison between the norms and precepts of Islam and the rules of humanitarian law. Islam has its origins in the last part of the 6th century and first part of the 7th century of the Christian era; it necessarily bears the mark of this period, particularly in terms of questions relating to war, the use of arms, the fate of prisoners and non-combatants, etc. The nature and scale of modern warfare, the moral concerns of present-day nations, and the conduct of relationships between the various human groups, however, have little in common with what they were in the 6th and 7th centuries. Any attempt to analyse the Islamic approach to international humanitarian law therefore involves accepting approximate interpretation and reasoning by analogy. As such, the analysis from the outset cannot be very strict.

Finally, it can be noted that, although Islam constitutes a unit of civilization, the Islamic world is made up of a whole range of nations and cultures and there are many important interpretations and readings of the Koran. In this article, we shall be referring to the dominant Sunnite reading.

Our main sources are the works entitled *Siyar*, which are devoted particularly to the law of warfare.

Worthy of special mention is the work of Al Aouza'i (who died in 774) entitled *Kitab assiyar*. We know of this work because of the criticism levelled against it by Abu Youssef, disciple of Imam Abu Hanifa who founded the Hanefite school. It was published in Cairo in 1939 by Abu Alwafa al Afghani as *Kitab arrad 'ala Siyar al Aouza'i*. We are also familiar with the work through the extract cited by Imam Châf'i in the seventh volume of his *Kitab al Um*.

A better-known war treatise was written by Chaybani in the 8th century. Chaybani was another disciple of Imam Abu Hanifa. We have become aware of his *Kitab assiyar al kabir* as a result of the commentary drawn up by Sarkhasi in the 12th century and published by Salah eddin al Munjid in 1971.

Whilst it would be of interest to describe here the Islamic conception of war and its legitimacy, such considerations would go beyond the scope of our subject in that this would automatically bring into play

ethical, legal and religious premises. Consequently, our analysis will be limited to the following points: the first, and probably the most important, will deal with the legal situation and treatment of combatants taken prisoner, the second with the fate of the non-combatant population, and the third with the Islamic standpoint on the enslavement of the losers of the war.

I. Situation and treatment of combatants taken prisoner

According to the principles of Islam

The problem of the actual conduct of war has not been paid any special attention by Moslem writers. At a time when weapons were far less lethal than they are now, and when there were no mass-destruction weapons, it is only natural that this question did not arouse attention. All means of gaining victory, including the use of stratagems of war, were therefore considered justifiable.

One of the most crucial problems in humanitarian law relates to the situation and fate of prisoners of war, and it is discussed in the Koran itself on three occasions.

The first mention comes in surat VIII, verses 67-68; these verses were revealed in relation to the prisoners of the Battle of Badr, the first between Moslems and infidels. Some hesitation appeared as to what should be done with these prisoners, this being the first time that the prophet and his companions had been faced with this problem. Some companions advised the prophet to keep the prisoners and to demand a ransom later on. Omar, the future Caliph, advised that they be executed. The prophet decided to follow the advice of the majority, and at this point came the verse passing censure on the prophet for having kept prisoners and having been tempted by the ransom he expected to receive from his enemies.

In substance, the verses state: "It is not behoven to a prophet to take captives before the enemy has been crushed; you desire the riches of this world whereas Allah's desire is to give you the other world...".

In these verses, the holy word thus condemns the very act of taking prisoners of war. Certain scholars have interpreted this to mean that all combatants, including prisoners, have to be killed to a man.

It will be noted that this text appeared at the time of Badr, in other words when Islam was in the throes of birth and therefore still fragile and when the State could not provide for prisoners.

As a result, certain interpreters see these verses as bearing only on that specific situation, and this point of view finds support in a subsequently revealed text which constitutes the second Koranic revelation on prisoners.

This occurs in verse 4 of surat 47 (Mohammed), which can be translated as follow: "If you encounter infidels, beat them until they are routed and tighten their shackles; then, when the war is over, render them their freedom (mân) or exchange them for a ransom (fida)".

From this text we can see that captivity, which is obviously only of a temporary nature, must of necessity give rise to unconditional freedom or freedom bought with a ransom. It is up to the political authority to choose between these two solutions on the basis of general interest. The execution of prisoners thus becomes illegal.

The third text, a later one than the second, is phrased in still stricter terms. It is contained in the verse of the "Sword" which is the fifth in the surat 9 of Repentance: "When the months ¹ have expired, kill the idolaters wherever you find them, take them, besiege them, ambush them. If they repent, follow the prayers and pay the "zakat", free them, for God is lenient and merciful".

Certain scholars consider that these verses abrogate the one on freedom or ransom and that, consequently, the execution of prisoners of war is essential.

If we compare these three texts from the Koran, it is clear that they are not in agreement; it is not surprising, therefore, that the scholars of Islam have differing opinions on this question.

If we now return to the tradition of the prophet, we can see that, on this point as well, there are no fixed standards, and that the problem of the ultimate condition of the prisoner has been solved in several ways.

The siyars, the Hadith books, the Koranic exegeses (especially the exegesis of Al Jassas: *Ahkam al qur'an*) point out that the prophet is said to have ordered the execution of certain prisoners at Badr, such as Nadhar Ibn Harith, or at Uhud, like Abu 'iza, the poet.

But these same sources describe the prophet as having made wide use of unconditional freedom and as having had recourse to the "fida"

¹ It should be noted that Islam sanctioned the existence of four sacred months during which it was illegal to wage war.

in two ways—either the ransom or an exchange with Moslem prisoners who had fallen into the hands of the enemy.

Confronted with these facts, the Sunnite scholars provide divergent solutions: some restrict themselves to the “fida” and the “mân”, set out in the fourth verse of the surat of Mohammed; others dismiss the “mân” and accept the other solutions; yet others accept all the solutions, with the choice falling to the political authority: death, freedom, ransom, exchange or enslavement. We shall return later to this last point.

Divergences also appear as to the practical implementation of each of these acts.

These doctrinal divergences over the interpretation of the Koran and the Sunnah are in complete contrast to the virtual unanimity of modern Moslem thinkers, who retain only the solution given in the surat of Mohammed, which these authors see as the only one constituting the standing legislation of Islam, in that all counter-provisions are purely temporary or relate to one sole instance. There are thus three solutions accepted: when the fighting is over, enemy prisoners must either be freed, or exchanged against those held by the enemy, or again freed upon payment of a ransom.

This is the viewpoint of scholars such as Professor Wahbat Azahili, in his book *The Effects of War in Moslem Law*, Ali Ali Mansoor in *Islam and International Law*, and Mohamed Kamel Eddin Imam in *War and Peace in Islamic International Law*. Modern interpreters of the Koran opt for the same solution, Sayed Kotb, for example, in his exegesis *In the Shadow of the Koran*, and Sheik Mahmood Shaloot.

According to custom

Let us now look at how prisoners of war were actually treated during the initial stages of Islam.

In this respect, it should be remembered that we are discussing an era when the individual did not have the same intrinsic value as he does nowadays, nor did his subjective rights retain the same degree of attention. Attention was, on the contrary, focussed mainly on the group and its survival. At the time when Islam was born, the ethics of the warrior paid no heed to considerations about the value of the individual. The mores of the period were characterised by extreme violence, by adherence to the law of retaliation, and by practices that are presently qualified as cruel or barbarous: the enemy was crucified, mutilated,

dismembered and beheaded. Both men and women took part in these practices.

In this sphere Islam made a break with the past. Certain practices and atrocities are unconditionally condemned, whether or not there is a state of war. An example of this is the pre-Islamic custom allowing a father to bury his daughters alive. As regards the attitude of Islam towards the treatment of combatants taken prisoner, there are in reality two principles involved. The first is the principle of reciprocity. The second teaches that all unnecessary suffering must be avoided. Scholars are unanimous in stating that it is illegal to inflict degrading or inhuman treatment on enemy combatant prisoners. There can be no doubt whatsoever that, although Islam is still influenced by the methods of warfare in use at the time it was born, it has nonetheless taken a significant step forward towards the moralization and humanization of war.

The Hadith books mention a number of important facts in this respect. Thus, at the battle of Badr, the prophet is said to have recommended his fellow-warriors to show goodwill towards the prisoners. Having seen that some prisoners had been exposed to the sun during a battle, the prophet ordered that they should not suffer the heat of the day in addition to the heat of their weapons.

Similarly, traditional writings state that prisoners were well fed. The attitude adopted by the prophet and his companions during their battles is thus the basis upon which scholars consider it proper that prisoners of war be well-treated, and that the imposition of thirst, hunger or exposure to the sun is, on the contrary, to be prohibited. This is the thesis of Imam Abu Youssef in his *Kharraj*, for example.

The Islam standpoint is extremely clear as regards combatants killed in battle. In Arabia, and indeed elsewhere, there was a custom consisting of mutilating the bodies of enemy combatants. Among the Arabs, women participated in these sinister practices, sometimes devouring the enemy's liver to avenge a husband or brother who had been killed in the battle.

For example, during the Battle of Uhud, Hind, mother of the future Caliph Muawia, indulged in this kind of mutilation of enemy corpses. Hind concentrated in particular on the uncle of the prophet, Hamza, by disemboweling him and crushing his liver. When the enemy retreated and the Moslems returned to bury their dead, the prophet, who had considerable affection for his uncle Hamza, found him lying on the battlefield in this lamentable condition and shouted "By God, if God gives us victory over them, I shall punish them as no Arab has ever done".

The interpreters of the Koran explain that, at this point, the famous verses 127 and 128 of the surat of the Bee were revealed: "Let thy punishment befit the crime thou hast suffered, but thou woudst do well nonetheless to arm thyself with patience. Therefore be patient, thy patience will be possible only with the help of God. Grieve not because of them, and let not their plot cause anguish in thee. God is with those who are kind and who fear Him".

On the basis of these texts, the Sunnite scholars condemn the mutilation, torture and drowning of combatants, whether they be dead or alive. Such is the standpoint of Imam Chaf'i, for example, in his *Kitab al Um* (part IV), and of Chawkani in his *Natl al Awtar*.

Another practice current at the time consisted of cutting off heads and sending them to the authorities. In his *Siyar*, Chaybani reports that Caliph Abu Bakr condemned this practice, and the conduct of the first four Caliphs is the equivalent of a norm under Islam. In response to this, Abu Bakr was told that the enemy behaved in a like way towards the Moslems, and that consequently the law of retaliation should be applied. Abu Bakr replied: "Are we going to follow in the footsteps of the Persians and Byzantines?" This occurrence is described by Al Baihaqi in his collected papers.

There can be no discussion either of the fact that Islam condemns immoral practices on enemy combatants, such as disrobing them or violating their modesty. Islam considers such acts to be illegal in themselves, and in absolute terms. The Islamic moral code is very strict on this point.

Without burdening ourselves with details, we can note that most Hadith books—such as those of Boukhari, Muslim and Al Baihaqi—as well as other classical works contain numerous examples from the Sunnah in which the prophet recommends adopting a humanitarian attitude towards enemy prisoners or condemns the excesses of his lieutenants, as was the case for Khaled ibn al Walid.

II. The fate of the non-combatant population

Scholars unanimously agree that the general principle governing the non-combatant population is that no non-combatant may be put to death. They base this opinion on the text of verse 190 of the surat of the Heifer: "Fight in the way of God those who fight you, and do not attack anyone, for God has no love for the unjust".

When looking at the legal situation of non-combatant populations, we are confronted with a rapidly changing phenomenon, because of the way in which the nature of wars themselves has changed.

At the time of the prophet, battles were fought among tribes or groups within limited areas. War was a personal rather than a territorial affair. As a result, non-combatant populations, together with their property, suffered the same fate as that of the combatants. These populations became "sabaya" and, with their property, formed part of the spoils ("ghanima").

We must therefore keep in mind the fact that war was then an exercise in group solidarity. All able-bodied men took part in the battles, so in the last resort the fate of the non-combatant populations depended on that of the warriors. If the latter were vanquished, the "civilian population" was assimilated, as slaves, into the overall gains from the war, and was thus divided, with the other spoils, among the victors. There is a consensus of opinion on that point among scholars.

On the other hand, the liberation of the "sabaya" is the subject of much discussion. The Hanefites do not accept it. Other schools are prepared to accept it, but under a number of conditions, above all that the victorious warriors who possess the spoils approve.

Most scholars feel that the legal status of the "sabaya" depended, in the last resort, on the political authority, which could choose between liberation, "fida" and enslavement.

The status of "sabaya" thus corresponded to a stage when wars were inter-tribal affairs calling for solidarity. But, very early on, it became clear that the system was impractical when wars were no longer fought between tribes but between vast inhabited empires with permanent armies. In these cases, the fate of the civilian populations was governed by new laws promulgated by Omar Ibn al Khattab.

The peoples of Iraq never had the status of "sabaya", but were permitted to remain free in exchange for the payment of a special annual tax, the "jiziah", which was a personal tax. These peoples, who thus found themselves in a land that had become Moslem, acquired the status of "dhimmi", the name given to non-Moslems living in an Islamic territory. Their rights were guaranteed: the right to be defended and protected by the State, the right to practise their religion freely, the right to their own social institutions and personal laws, to dispose of their possessions, to move around freely, etc.

Consequently, the status of the non-combatant populations is not that of "saby", enslavement, but freedom, upon payment of a tax.

Omar left the conquered lands to their owners in return for the payment of a new tax, the "kharraj".

The treatment of non-combatant populations is governed by the prophet's Hadith, in which it is said that prior to battle the prophet told his lieutenants: "Go to war in the name of God and follow his path; fight the infidels, but do not deceive, do not betray, do not mutilate and do not kill any children".

There are precise directives regarding women, children, old people and monks or men of religion. In this respect, Abu Bakr recommended Yazid Ibn Abi Soofian, 'Amr Ibn al 'As and Sharhabil Ibn Hassanah, before the conquest of Syria: "Do not attack children, women or elders; and you will find people who have sought seclusion in towers, leave them to devote themselves to what they are seeking".

Two fundamental ideas underlie these directives: sparing the civilian population from suffering, and respecting, in particular, men of religion.

Opinions are still divided, however, as regards acts of destruction of property, towns and non-military installations of the enemy. Chaybani maintains that they are legal, and says that Abu Youssef shares this view. On the other hand, Al Aouza'i judges them to be illegal.

A number of works give accounts of relevant directives issued by Abu Bakr, who is said to have given ten commandments to one of his generals: "Do not kill any women, children, elders or wounded. Do not have fruit-trees or date-trees cut down. Do not burn them. Do not destroy inhabited places. Do not have cows or sheep drowned. Do not be guilty of cowardice, but do not be inspired by hatred".

Under Moslem law, the enemy's property forms part of the "ghanaim" (spoils), for the distribution of which there are special rules and which, prior to being shared out, belong as a whole to the entire community. Consequently, a Moslem soldier is not permitted to indulge in looting or stealing the property left behind by the enemy. Such an act, moreover, falls within what the Moslem law of warfare terms as "ghulul", and which constitutes a kind of war crime that is heavily sanctioned.

The conclusions we have been able to draw regarding the humane treatment of prisoners of war also apply, of course, to civilians.

III. The problem of slavery

It cannot be denied that, at its origin, Islam did not abolish slavery, since the latter could be the fate reserved for a prisoner of war and

could, in principle, even be applied to civilian populations if the military or political authority decided to submit them to "saby".

This fact may appear somewhat paradoxical and, at all events, contrary to the overall philosophy of Islam, which is one of freedom and equality. Once again, however, we must look at Islam in its historical context.

When Islam was born, slavery was a dominant institution throughout the world, and its occurrence in the wake of wars was one of its main sources. Islam could not take an attitude that ran counter to the situation that obtained at the time.

Nonetheless, we know that the status of "saby", whilst remaining theoretically valid for legal scholars, virtually ceased to exist under Omar. The civilian populations of a land which fell to the forces of Islam retained total freedom and were taxed of ("kharraj").

It should further be recognised that the legislation drawn up under Islam in its infancy was to limit the effects of that institution as far as was possible. The Koran, the Sunnah and the attitude of the prophet's companions were all directed towards one and the same result. The verses in the Koran which glorify the setting free of slaves as an act of goodwill and godliness are innumerable. A man is said to have asked the prophet: "Tell me an act which will keep me from hell and bring me nearer to paradise". To which the prophet is said to have replied: "Free a slave".

There are also Hadiths that condemn the ill-treatment of slaves. The prophet is said to have rebuked Abu Dhar al Ghifari for having insulted one of his slaves, saying: "God has placed slaves in your hands, and whosoever has received a brother in his hands shall have him eat what he eats, wear what he wears, live where he lives, and shall not burden him with what he himself cannot bear, save that he help him".

First of all, Islam reduced the sources of slavery. These sources were basically the following: enslavement following war, for crimes or to compensate for crimes, for debts, by decision of the head of the family, self-inflicted slavery and heredity. Islam preserved only two sources: slavery following war (which is of interest to us here) and for reasons of heredity.

Furthermore, Islam greatly encouraged disenslavement by making it a means to atone for a sin or a wrong. This was the case for unintentional crimes, breaking the fast during Ramadan, or breaking an oath, etc.

At the same time, Islam set up legal channels through which a slave may purchase his freedom, such as "mukatabah" whereby the slave

earns his liberty by rendering a service, or the institution of "um al walad" whereby a female slave who gives birth to a child by her master automatically gains her freedom. The prophet said: "Her son has freed her".

In the final analysis, Islam thus closed many of the doors by which an individual entered into slavery and, at the same time, opened new doors for a slave to become free. These facts enable contemporary Moslem authors to say that Islam did not simply ratify the legislation on slavery that existed prior to its creation, but that its own laws favoured the setting free of slaves. This standpoint is adopted, for example, by the great Azharist academic, Sheik Mansoor Rajeb, as well as Sayed Kotb and Mahmood al Akad. The overriding tendency among contemporary authors is to argue that the disappearance of slavery in the world is not only not contrary to Islamic provisions on the question, but is in total conformity with Islam.

It can be concluded that classical Moslem law contains rather divergent positions on modern humanitarian law. Its attitudes often coincide with those of international humanitarian law; occasionally, however, they diverge from it. Classical jurists analysed the problems of the law of warfare from a different standpoint than our own.

But it would be wrong, and contrary to the precepts of Islam, to end on that statement. For it should not be forgotten that, on the legal front, the methodology adopted by Islam is founded on effort ("ijtihad"). Consequently, it is the duty of contemporary Moslem jurists to adapt classical solutions and interpretations to the needs of the times. The only condition is that the results should not run counter to the letter and spirit of the Koran or the Sunnah, but should foster the interests of the Islamic community. In fact, nothing in the Koran or Sunnah seems to be in direct contradiction to international humanitarian law. The opinions of certain great scholars should only be taken as doctrinal standpoints, and these must be divested of their sacredness that the fortuities of history have bestowed on them.

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